Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1996

BERNA KAHN TEE, et al.,

Petitioners,

v.

UAL CORPORATION and UNITED AIRLINES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Railway Labor Act ("RLA") prohibit an employer from entering into a binding agreement with a union concerning wages and other employment terms for the employer's non-unionized employees?

LIST OF ALL PARTIES

Berna Kahn Tee, Beverly Yager, Danny Ciccariello, Frank Pagon and Jan Chase, and UAL Corporation and United Airlines, Inc. were the only parties in the proceeding before the United States Court of Appeals for the Eleventh Circuit.

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I. OPINIONS BELOW

On September 1, 1995, the Honorable Orinda D. Evans, United States District Judge for the Northern District of Georgia, Atlanta Division ("District Court"), issued an Order granting UAL Corporation's and United Airline Incorporated's Motion to Dismiss Petitioners' cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6). The District Court's Order is reproduced in the Appendix at A-18.

On July 2, 1996, the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit" or "court below") issued its decision affirming the District Court's Order. The Eleventh Circuit's decision is reproduced in the Appendix at A-31.[1]

On January 2, 1997, the Eleventh Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc. The Eleventh Circuit's decision is reproduced in the Appendix at A-37.

II. THE BASIS FOR JURISDICTION

The United States Circuit Court of Appeals for the Eleventh Circuit issued its decision on July 2, 1996. On July 22, 1996, Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc ("Suggestion for Rehearing") pursuant to Federal Rules of Appellate Procedure 35 and 40 and Eleventh Circuit Local Rule 35-6. The Eleventh Circuit denied the Suggestion for

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[1] Page references to the Eleventh Circuit's decision will be cited hereinafter as "*Opinion* at ___."

Rehearing on January 2, 1997. Petitioners now file this Petition for Writ of Certiorari with the Clerk of this Court within ninety days of the Eleventh Circuit's denial of the Suggestion for Rehearing.

This Court has jurisdiction under 28 U.S.C. § 1254 (1).

III. STATUTORY PROVISIONS

TITLE 45, UNITED STATES CODE:

§ 152 Railway Labor Act, General Duties

Third. Designation of representatives

> Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.
>
> . . . .
>
> Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.
>
> Employees shall have the right to organize and bargain collectively through representatives

of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, [t]hat nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

. . . .

IV. STATEMENT OF THE CASE

Petitioners brought this action to redress violations of rights secured by the RLA. United Airlines, Inc. ("United") is a "carrier" as defined under the RLA, Section 1, First, 45 U.S.C. § 151, First. Petitioners are putative class members and are "employees" as defined under the RLA, Section 1, Fifth, 45 U.S.C. § 151, Fifth. The allegations of Petitioners' Complaint are set forth below.

United's employees are divided into several distinct groups of workers, three of which are unionized: United's pilots are represented by the Airline Pilots Association, International ("ALPA"); its flight attendants are represented by the Association of Flight Attendants ("AFA"); and its mechanics and related employees are represented by the International Association of Machinists & Aerospace Workers ("IAM"). Petitioners are all members of the craft or class of Customer Service Employees of United. This class of employees is part of a larger group of United's non-unionized salaried and management employees ("SAM employees").

In 1991, the IAM attempted to organize the Customer Service Employees. In response to this and earlier unsuccessful union organizing attempts, United vigorously argued to its non-unionized employees that their employment interests would not be served by allowing a union to intercede between them and United in regard to their wages, benefits, and other terms and conditions of employment. United urged the SAM employees to vote against representation by the IAM, and the SAM employees relied on United's promises of unilateral treatment by consistently rejecting union representation,

despite the relatively greater benefits and protections negotiated by unions on behalf of other crafts or classes of United's employees.

In January 1993, United implemented a drastic cost reduction program and slashed the wages of SAM employees by five percent. During collective bargaining with its three unions, United asked for wage, benefit, and work rule concessions. ALPA, the IAM, and the AFA all rejected United's request, and on July 16, 1993, a coalition of the unions proposed a restructuring plan predicated on "employee investments" by the unions and the non-unionized SAM employees. The AFA eventually dropped out of the discussions, and on November 11, 1993, ALPA and the IAM proposed that they *and* the SAM employees make wage concessions with a present value of approximately $2.874 billion. After much negotiation, United, ALPA, and the IAM agreed in a letter from the unions to United's Board of Directors ("Board") to execute new collective bargaining agreements reflecting newly negotiated wage rates, benefits, and other terms and conditions of employment. The unions then recited United's agreement to "establish appropriate employment terms for the salaried and management employees as described in [the agreement]."

Following a March 14, 1994 meeting, the Board voted on March 24, 1994 to approve the definitive documentation for the recapitalization. In doing so, the Board accepted the unions' final proposals on previously unresolved issues, including the question of the nature of the SAM employee concession package. Thus, United accepted the unions' final proposal regarding the SAM employee concession package.

On March 25, 1994, United, ALPA, and the IAM executed an Initial Plan of Recapitalization. On June 2, 1994, the parties amended the recapitalization plan, and executed a final agreement ("Final Plan"). The Final Plan included drastic wage and benefit reductions and work rule changes for the SAM employees.

Immediately after obtaining the necessary approval of the Final Plan by its stockholders on July 12, 1994, United implemented the negotiated wage and benefit reductions and work rule changes affecting the SAM employees. The reductions are binding on United for five years and nine months (future participation in the "employee buy-out" by the AFA would change the length of the time period for United's binding commitment). The reductions are judicially enforceable against United by the ESOP Trustee, State Bank of Boston. Thus, by entering into its agreement with ALPA and the IAM, United sacrificed its right to deal with the SAM employees unilaterally for the entire length of the "investment" period for SAM employees. Indeed, *the Final Plan provides that the only way for the SAM employees to opt out of the ESOP or otherwise change the terms of their employment during the "investment period" is to unionize and bargain for such changes.*

The District Court dismissed Petitioners' Complaint on September 1, 1995, for failure to state a cause of action. The Eleventh Circuit affirmed the District Court's ruling, holding that Section 2, Third of the RLA, 45 U.S.C. § 152, Third, did not provide a basis for Petitioners' claim because the Complaint did not make any of the following allegations:

(1) that United considered the IAM or ALPA to be the "representative" of the SAM employees;

(2) that United recognized the unions as acting on behalf of the SAM employees;

(3) that the Final Plan prohibited the SAM employees from selecting a collective bargaining representative; or

(4) that United imposed unsatisfactory terms and conditions of employment upon the SAM employees for the purpose of influencing or coercing them into choosing collective representation.

Contrary to the Eleventh Circuit's reasoning, none of these allegations is necessary for Petitioners to state a viable claim under Section 2, Third of the RLA. As shown herein, the decision of the court below creates an indefensible precedent that gravely misconceives the nature of federal labor law protection of the right to reject collective representation.

V. REASONS FOR GRANTING THE PETITION

This Court has viewed Section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth, from its inception as "addressing primarily the *precertification* rights and freedoms of *unrepresented* employees" to be free from company coercion. *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 440 (1989) (emphasis added). A critical precertification right is that a labor organization cannot bargain for employees whom it does not, in fact, represent. *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 176 (8th Cir. 1969). Generally, a labor union owes a duty to all members of the bargaining unit to represent

their interests in a fair, non-arbitrary, and non-discriminatory manner. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 177 (1967). No such duty exists, however, when the union is not the lawfully recognized or certified bargaining agent for employees. Thus, to permit such a union to bargain for those employees would violate their fundamental right of self-determination. *Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Union v. NLRB*, 9 F.3d 218 (2d Cir. 1993).

Although the Eleventh Circuit's decision does not create a direct conflict among the circuits on the particular issue raised by Petitioners' claim, it does contravene this Court's declarations for more than a half-century that employers may bargain only with unions duly recognized or certified to represent employees concerning the wages, benefits, and other employment terms for those employees. *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515, 548 (1937). The holding of the court below also undermines the common premise of several well-recognized and heretofore unchallenged lines of federal labor law authorities. As a result, the holding below conflicts in principle with decisions of federal appellate courts in the Second, Third, Fourth, and Fifth Circuits on a variety of labor law issues, including accretion, "double breasting," the validity of pre-hire contracts in the construction industry, and the question of an employer's right to bargain with minority unions.

Absent reversal of the Eleventh Circuit and clarification by this Court of the federal labor law rights of non-unionized employees, the holding below will have a dramatic impact on national collective bargaining practice.

Among other things, it will enhance the ability of powerful unions to dictate the wages, benefits, and other employment terms of unrepresented employees, coercing or encouraging them to unionize in violation of their fundamental labor law right of self-determination.

This case arose out of the largest and most highly publicized employee buyout of an American corporation. Although it was a deal struck between United and the unions representing the pilots and mechanics at that airline, the Final Plan also mandatorily includes approximately 24,000 non-unionized SAM employees, Petitioners among them. According to the explicit terms of the Final Plan, United cannot unilaterally change the wages and benefits for these non-unionized employees during the life of the agreement. In other words, United bound itself to an agreement with unions that did not legally represent the SAM employees and thus owed them no duty of fair representation in the negotiation and execution of the Final Plan. Because United sacrificed its right to act unilaterally regarding the SAM employees, there is only one way for those non-unionized employees to opt out of the ESOP or to achieve any other change in their wages and benefits during the life of the agreement. *As the Final Plan itself contemplates*, that one way is for the SAM employees to unionize and demand such change through collective bargaining.

Accordingly, Petitioners challenge their mandatory inclusion in the ESOP as the product of an unlawful agreement between United and the unions because the Final Plan coerces or influences the SAM employees to choose collective representation in lieu of continuing non-unionized status. Although Petitioners recognize

that their non-unionized status *would have* permitted United to act unilaterally in the same fashion concerning their wages and other employment terms, it is irrelevant that United *might* have done so in the absence of the enormous pressure that existed to reach agreements with ALPA and the IAM concerning the pilots and mechanics. The point critical to the development of federal labor law is that an employer's right to act unilaterally in regard to non-unionized employees does not permit the employer to enter into a binding agreement concerning such employees with a union that does not legally represent them and owes them no duty of fair representation. If the right of unilateral action does permit such employer conduct, as the Eleventh Circuit incorrectly held, the employees' right to reject collective representation is meaningless. Again, as the unlawful agreement in this case indicates, the *only* choice for employees in that event is to continue working under the unlawfully negotiated employment terms or obtain their own union and bargain for changes in the otherwise binding agreement reached between the employer and the "third party" union. Thus, the employer's conduct undeniably and inherently coerces or influences employees to choose collective representation.

By way of illustration, the Eleventh Circuit's reasoning leads to the following startling result: an employer can encourage its non-unionized employees to reject collective bargaining; the employees can follow the employer's lead and reject representation by a union one day; and, the next day, in exchange for bargaining concessions by the rejected union concerning employees it already *does* represent, the employer can negotiate and

reach agreement with the very same union concerning the employment terms for the employees who rejected representation by that union. Such a result frustrates the traditional expectations of non-unionized employees that their employer will deal with them unilaterally in the labor law sense (in other words, that their employer will not bargain with a union that does not represent them). The inherent and inevitable effect of the employer's freedom to bargain with the rejected union regardless of the employees' choice would be to coerce or encourage those employees to unionize in order to avail themselves of the protection afforded by a labor organization's duty of fair representation.

The Eleventh Circuit's decision also upsets the long-settled and reasonable expectations of labor negotiators on both sides of the bargaining table. Having no legal obligation to bargain and reach agreement with unions concerning unrepresented employees, employers generally do not do so – at least not overtly as in this case. Employers sometimes "wink" across the bargaining table with implicit promises to take certain actions regarding unrepresented employees in exchange for concessions from the unions concerning their own lawfully represented constituencies. The Eleventh Circuit's approval of an *explicit*, highly publicized collective bargaining agreement concerning wages and benefits for unrepresented employees will now encourage conduct previously *assumed* to be unlawful. Left undisturbed, therefore, the Eleventh Circuit's decision will pave the way to other major transactions in which employers and unions bargain and reach agreement concerning the unlawful bargaining subject of wages and other employment terms for

non-unionized employees. The inevitable result will be to force those same employees to choose collective representation as a defensive measure against unlawful agreements between their employers and "powerful third party" unions.

The impact will be widespread. ALPA and the IAM are large national unions representing thousands of employees at other major airlines, and the IAM represents thousands more employees in a variety of other industries. Unions generally, and ALPA in particular, openly advocate employee ownership as a means of achieving the goals of their constituencies. Roger D. Hall, *ESOP Efforts of the Air Line Pilots Association*, 7 Lab. Law. 31, 313 (1991). (Appendix at A-43). Not surprisingly, therefore, after consummation of their deal with United, ALPA and the IAM discussed with USAir Group Inc. ("USAir") the possibility of a similar transaction that would include that carrier's non-unionized employees. *USAir Gets Proposal From 3 Labor Unions for Some Concessions*, Wall St. J., Feb. 7, 1995. (Appendix at A-41). Mr. Wolf, the chief negotiator for United who benefitted from a generous golden parachute triggered by the agreement at issue in this case, is now the chief executive officer of USAir. *USAir Picks Wolf, Industry Veteran, as Chief in Bid for Labor Cost Savings*, Wall St. J., Jan. 17, 1996. (Appendix at A-47). In short, absent reversal of the Eleventh Circuit's decision in this case, it is highly probable that unions with sufficient clout will reach similar binding agreements with favorably disposed executives of major employers. Like the transaction in this case, those agreements will violate the self-determination rights of hundreds of thousands of employees who reasonably expect

that their non-unionized status prohibits employers from doing exactly what United did in this case.

This Court can prevent that development with an unequivocal declaration that the right to choose against collective representation is entitled to the same protection under federal labor law as the right to engage in collective activity. More specifically, the Court can clarify that while unions have the right to acquire ownership interests in employers as a means of pursuing the goals of their memberships, the law prohibits employers from acceding to demands by those unions to use the wages and benefits of employees they do *not* represent to accomplish the otherwise legitimate ends of collective representation.

A. The Railway Labor Act Protects the Right Not to Join a Union and Must Be Read in Accordance With this Court's Precedents to Ensure that Such Statutory Protection Is Not Superfluous or Void.

As this Court has stated, the meaning of a statute must first be sought in the language of the act itself, "and if that is plain the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Courts also may not construe statutes in such a way as to render any part of them meaningless or superfluous. *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir. 1987) ("We should avoid an interpretation of the statute that renders any part of it superfluous or does not give effect to all of the words used by

Congress."). The Eleventh Circuit's decision in this case violated this fundamental rule of statutory construction.

The plain language of the RLA protects the right not to join a labor organization. *See Russell v. National Mediation Bd.*, 714 F.2d 1332, 1341 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). Under the RLA, employees have "the unfettered right to abstain from indulging in union activity." *NLRB v. International Union, United Auto., Aircraft & Agric. Implement Workers*, 320 F.2d 12, 15 (1st Cir. 1963); *see also NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985) (when group of employees constitutes appropriate bargaining unit, "the employees have the option of 'going it alone,' with or without a bargaining representative, and there is no reason not to allow them to exercise that choice."). Yet the Eleventh Circuit's interpretation of the RLA makes this explicit statutory guarantee meaningless; under the analysis of the court below, an employer is free to engage in collective bargaining with a union concerning employees that the union does not even represent, and, as in this case, can even "treat" with the same union that the employer successfully persuaded the employees to reject as their collective bargaining representative. This statutory interpretation eviscerates RLA protection of the right not to unionize and violates this Court's own precedents.

In *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515 (1937), this Court stated that the RLA "imposes the affirmative duty to treat *only* with the true representative, and hence *the negative duty to treat with no other.*" *Id.* at 548 (emphasis added). *Virginian Railway's* first duty is an affirmative one to treat only with the true representative. While it is true that this affirmative duty cannot arise in

the absence of a true representative, the Eleventh Circuit ignored the second and distinct duty identified by the Supreme Court – the duty to treat with no other. This second negative duty is one that necessarily arises even in the absence of a true representative. The apparent conclusion of the court below that *Virginian Railway* is limited to its facts, with the result that the duty to "treat with no other" only arises in the presence of a true representative, leads to the insupportable notion that the RLA favors the right to collective representation over the right to reject it. Although the court below acknowledged that the RLA ensures the option to reject collective representation, it incorrectly assumed that the very exercise of that option extinguishes such statutory protection. Thus, the Eleventh Circuit incorrectly refused to recognize that the RLA's right to reject representation gives rise to a necessary corollary of that right – one that prohibits the carrier from entering into agreements with unions that affect the terms and conditions of employment of non-unionized employees. (*Opinion* at 6). *See NLRB v. Clegg*, 304 F.2d 168, 175 (8th Cir. 1962) ("An employer need not, and indeed he must not, bargain with an uncertified union . . . which loses its majority status as a result of repudiation by the employees.").

The Eleventh Circuit's holding also cannot be reconciled with Supreme Court case law under the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §§ 151-169 (1947).[2] United's conduct in this case would be

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[2] NLRA decisions may be used to illuminate the scope and intent of the RLA where, as here, substantially similar provisions control both statutes. *Brotherhood of R.R. Trainmen v.*

unlawful under Section 8(a)(1) of the NLRA, 29 U.S.C. § 158 (a)(1). In *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944), the Supreme Court made it clear that "the negative duty to treat with no other" is equally applicable to cases involving direct negotiations between the employer and its employees. The employer in *Medo Photo Supply Corp.* was engaged in collective bargaining negotiations with the union certified as its employees' exclusive bargaining agent. During the pendency of those negotiations, the employer also negotiated directly with its employees over their wages. The Court held that the employer's conduct violated the NLRA:

> The obligation [to bargain] being exclusive, it exacts "the negative duty to treat with no other." Petitioner, by ignoring the union as the employees' exclusive bargaining representative [and] by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending . . . violated § 8(a)(1) of the Act, which forbids interference with the right of employees to bargain collectively through representatives of their own choice.

Id. at 683-84 (citations omitted). If, as the Supreme Court held in *Medo Photo Supply Corp.*, the "negative duty to

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Jacksonville Terminal Co., 394 U.S. 369 (1969). This Court has stated that the primary difference between the NLRA and the RLA lies in the underlying policy on self-help; the RLA contains a ban on self-help during the freeze imposed while the procedures for the RLA run their course, while the NLRA contains no such ban. *National Airlines, Inc. v. International Ass'n of M. & A.W.*, 416 F.2d 998, 1004 (5th Cir. 1969). This primary distinction does not arise in this case.

treat with no other" means that an employer may not deal with its employees unilaterally once they have designated a union to represent them collectively, then the converse must also be true: an employer may not treat with a union over the collective employment terms of its employees if those employees have rejected collective representation.

The error in the Court of Appeals' conclusion that RLA protection ends as soon as employees choose not to unionize is exemplified by the decision of the Court of Appeals for the Third Circuit in *Black Grievance Comm. v. NLRB*, 749 F.2d 1072 (3d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985). In that case, the employer, Philadelphia Electric Company ("PECO"), dealt for over forty years with the Independent Group Association ("IGA"), an in house labor union, concerning wages, hours, and other working conditions of PECO employees. Although the IGA was never recognized or certified to represent PECO employees, the IGA enjoyed privileged status in the presentation and resolution of employee grievances at PECO. Believing that the IGA was unresponsive to alleged discriminatory practices on the part of PECO, however, several black employees formed the Black Grievance Committee ("BGC"). BGC representatives eventually filed an unfair labor practice charge against PECO for refusing to accord the BGC equal status to the IGA in the presentation and resolution of individual grievances.

Despite the fact that neither the IGA nor the BGC was a recognized or certified union at PECO, the Third Circuit held that PECO's favoritism toward the IGA was unlawful, reasoning that the right of self-determination

goes "beyond selection of an exclusive bargaining representative, and includes the right to be free from interference *with any* organizational activity." *Id.* at 1076 (emphasis in original). Thus, the court rejected the argument that privileged treatment of one non-majority union, with a refusal to treat another such union equally, is permissible employer conduct under the NLRA.[3]

The black employees in *Black Grievance Committee* were not materially different from the SAM employees in this case. Neither group of employees had exercised their right to engage in collective bargaining through a certified or recognized bargaining representative, and, in both cases, employers interfered with their rights of self-determination. Unlike the Eleventh Circuit in this case, however, the Third Circuit correctly recognized that statutory protection of the right of self-determination is not extinguished by the exercise of that right in a particular fashion.

The Eleventh Circuit's holding assumes that an employer's right to make unilateral changes in the terms and conditions of employment for its non-unionized workforce is equivalent to the right to negotiate and reach agreement concerning their employment terms with the very union those employees rejected as their

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[3] An employer is free to bargain with a minority union concerning members of the union only in the absence of an exclusive agency for bargaining created by a majority of employees in an appropriate unit. *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 741 (1961) (Douglas, J., dissenting in part). That is not the situation in this case. The SAM employees were not members of ALPA or the IAM.

representative. By definition, however, the right to act unilaterally does not encompass the right to reach a binding bilateral agreement with unions not certified to represent employees. *See NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963)(finding that unilateral action by an employer refers to conduct taken by the employer on its own in the absence of an agreement with a union). *Cf. Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (holding that a manufacturer can be held liable for damages when it terminates a dealer pursuant to an agreement with the dealer's competitor in violation of the federal anti-trust laws). United cannot hide behind its right to act unilaterally when it has also breached an *obligation* to act unilaterally in the federal labor law sense. To hold otherwise is to find for the first time that unions which do not represent a class or craft of employees, and that therefore owe them no duty of fair representation, can negotiate and reach agreement with an employer concerning employment terms for those unrepresented employees.

B. The Eleventh Circuit's Opinion Cannot be Squared With Established Labor Law Precedents of Other Federal Circuits Prohibiting an Employer From Imposing on Non-Unionized Employees Wages and Other Employment Terms Negotiated With A Union.

It is settled law that a labor organization cannot bargain for employees whom it does not, in fact, represent. *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 176 (5th Cir. 1969). To permit otherwise would violate the employees' fundamental right of self-determination. *Local*

144, Hotel, Hosp., Nursing Home & Allied Servs. Union v. NLRB, 9 F.3d 218 (2d Cir. 1993) ("*Local 144*"). Thus, for example, "an employer need not, and indeed he must not, bargain with an uncertified union which *loses* its majority status as a result of repudiation by the employees." *NLRB v. Clegg*, 304 F.2d 168, 175 (5th Cir. 1962) (emphasis added).

There is no logical basis for a different result when, as in this case, the union never acquired majority status in the first place. *See Sperry Sys. Mgmt. Div., Sperry Rand Corp. v. NLRB*, 492 F.2d 63 (2d Cir.), *cert. denied*, 419 U.S. 831 (1974). In *Sperry Systems* the Second Circuit held that an employer would have violated the rights of unrepresented California employees by complying with a union demand to impose upon those employees the terms of a collective bargaining agreement covering the company's unionized New York employees. The employer in that case had a contract with a union ("Local 445") certified by the NLRB to represent the employer's technical employees at all plants in the New York metropolitan area. Despite this geographically limited NLRB certification, Article 1 of the collective bargaining agreement provided for application of the contract to all of the employer's plants, "wherever situated." *Id.* at 65.

When the employer subsequently commenced operations in California with new employees whom it paid less for work substantially similar to the work done by New York employees, the union filed a grievance demanding that the company apply the collective bargaining agreement to the California employees. The employer refused to honor an arbitration award instructing it to apply the wage and benefit provisions of the New York contract to

the California employees; instead, it filed an unfair labor practice charge against the union. *Id.* at 65-66. In the meantime, the union lost a representation election among the California employees. *Id.* at 66.

The Second Circuit agreed with the employer that the New York union's demand to bargain over the employment terms for the California employees violated the rights of those employees. *Id.* at 67. Of particular relevance here, the court held,

> [R]egardless of the Union's motive in seeking enforcement of the arbitration award, it committed an unfair labor practice because the subject of the wages and working conditions of the Vallejo employees was not a permissible subject of bargaining in the New York City unit. Section 7 of the Act guarantees employees the right to organize and bargain collectively and the right to refrain from such activities. Generally, an employer commits the unfair labor practices of interfering with employees' § 7 rights and supporting a union in violation of § 8(a) (1) and (a) (2) when it imposes on employees of one unit the contract and bargaining agent of another unit.

Id. at 69.

Sperry Systems squarely supports the SAM employees' right to maintain their claims against United. Like the California employees in *Sperry Systems*, various groups of SAM employees rejected representation by the very union with which United negotiated and reached agreement concerning their wages and other employment terms. In *Sperry Systems*, the employer properly refused to impose the contract covering union-represented New

York employees upon the unrepresented California employees. In this case, however, United unlawfully agreed with the IAM and ALPA to impose the terms of the collectively bargained ESOP upon SAM employees. *See also Welch Scientific Co. v. NLRB*, 340 F.2d 199, 201, 203 (2d Cir. 1965) (employer committed unfair labor practice by applying contract with union representing Chicago employees to non-unionized New York employees).

The Eleventh Circuit's decision in this case is also inconsistent with a variety of other well-established labor law doctrines. For example, under the rationale of the court below, employers would be allowed to enroll in multi-employer bargaining units ("MEBUs") without the consent of their non-unionized employees and negotiate enforceable agreements with unions concerning them. Employers, however, are not allowed to violate their employees' self-determination rights in that fashion. *Baton Rouge Bldg. & Constr. Trades Council v. E.C. Schafer Constr. Co.*, 657 F.2d 806 (5th Cir. 1981). In *Baton Rouge Building & Construction*, the Fifth Circuit held that certain unenforceable pre-hire agreements[4] between the employer and the unions did not become enforceable merely because of the employer's enrollment in a MEBU,

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[4] "Section 8(f) of the NLRA authorizes pre-hire agreements between employers and unions in the construction industry; absent that statutory recognition of conditions peculiar to that industry, such agreements would be barred as violative of employee free choice." *Id.* at 809. The existence itself of a statutory exception for pre-hire agreements in the construction industry illustrates the principle that an employer cannot negotiate with a union concerning the wages and other employment terms of unrepresented employees.

when the employer had acted on its own without the support of a majority of its non-unionized employees. Similarly, the agreement between United and the unions in this case is unlawful to the extent that it governs the wages and other employment terms for SAM employees.

In another context, this one involving a "double-breasting" situation, the Court of Appeals for the Fourth Circuit acknowledged in *Virginia Sprinkler Co. v. Road Sprinkler, Fitters Local Union No. 669*, 868 F.2d 116 (4th Cir. 1989), that an employer would violate the self-determination rights of its non-unionized employees if it imposed upon those employees wages and employment terms negotiated with a union that they did not choose to represent them. In that case, there was common ownership of the unionized employer, Virginia Sprinkler Co. ("Virginia Sprinkler"), and a separate, non-unionized company, Virginia Pipe & Supply Co., Inc. ("Virginia Pipe"). Virginia Sprinkler brought an action against the union seeking a declaration that it was not obligated to arbitrate a grievance filed by the union for alleged violations of a provision in a collective bargaining agreement ("Article 3") designed to protect the union from the potentially adverse impact of the "doublebreasting" operation. Article 3 provided that the wage and fringe benefit terms of the collective bargaining agreement would apply to all work performed by Virginia Sprinkler as a single or joint employer, under its own name or that of another, within the territorial jurisdiction of the union. Virginia Sprinkler argued that Article 3 was unenforceable because an arbitrator's decision in the union's favor on any grievance arising thereunder would impose the wage

and benefit provisions of the collective bargaining agreement upon Virginia Pipe's unrepresented employees, violating their right to refrain from collective bargaining under Section 7, of the NLRA, 29 U.S.C. § 157.[5] *Id.* at 119.

The Fourth Circuit recognized that Article 3 would conflict with the Section 7 rights of the non-unionized Virginia Pipe employees if interpreted to require the imposition of collectively-bargained wage scales upon those employees. *Id.* at 119-20. The court of appeals nevertheless ordered Virginia Sprinkler to arbitrate the union's grievance because it agreed with the district court that Article 3 was susceptible to an alternative interpretation which would avoid this conflict: Virginia Sprinkler could pay its unionized employees as though they had performed the work actually assigned to the non-unionized Virginia Pipe employees. *Id.* at 120. Under this reading of Article 3, "Virginia Pipe's non-unionized workers would not receive the wages and benefits mandated by the collective bargaining agreement and *thus would in no way be forced to accept anything negotiated by a union not of their own choosing.*" *Id.* (emphasis added).

Thus, the linchpin of the Fourth Circuit's decision in *Virginia Sprinkler Co.* was a plausible interpretation of Article 3 that avoided "any possible conflict" with the right of non-unionized employees to refrain from organizational activity. *Id.* Under the Eleventh Circuit's decision in this case, however, analysis of the facial validity of Article 3 would have been unnecessary because the

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[5] Like Section 2, Fourth of the RLA, Section 7 protects employees' rights to refrain from engaging in collective activity.

owner of Virginia Sprinkler would have been free to agree with the union to impose the terms of the collective bargaining agreement upon Virginia Pipe's employees under any circumstances. The decision by the court below, therefore, is irreconcilable with the underlying premise of the Fourth Circuit's decision in *Virginia Sprinkler Co.*

For the same reason, the Eleventh Circuit's reasoning would make the accretion doctrine a meaningless concept under federal labor law. Under the accretion doctrine, an employer may incorporate a small group of employees within an already existing collective bargaining unit, without holding elections, provided that the added employees (1) do not constitute a separate bargaining unit, and (2) do not outnumber the employees who belong to the existing bargaining unit. *See NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1986); *Kaynard v. Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980). In *Local 144*, 9 F.3d at 222-26, the Second Circuit held that an employer committed an unfair labor practice by applying the terms of a collective bargaining agreement covering represented employees at one hospital to the non-unionized employees of a newly purchased hospital, where employees at the new hospital could not be accreted to the existing single-facility bargaining unit. *See also Local One, Amalgamated Lithographers of America v. Stearns & Beale*, 812 F.2d 763 (2d Cir. 1987) (in the absence of a single employer and single bargaining unit, it is a § 7 violation to impose the bargaining agreement of a unionized group on a non-signatory, non-unionized group); *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352 (9th Cir. 1970) (holding unlawful an attempt to impose a collective

bargaining agreement on non-unionized employees of newly purchased hotel added to an existing chain of employer's unionized Hawaiian facilities). The Eleventh Circuit's reasoning here would have obviated any need even to examine the accretion question in these cases, because, again, the employers would have been free in any event to apply the terms of the collective bargaining agreements to unrepresented employees.

C. The Eleventh Circuit Erred By Failing to Recognize that United's Conduct was Unlawful Because the Carrier "Treated" with the Unions as if They Were the Collective Bargaining Representatives of the SAM Employees.

"Coercion" under the RLA and the NLRA is objective, and a finding of coercion does not depend upon an employer's intent. *See, e.g., Carry Cos. of Ill., Inc. v. NLRB*, 30 F.3d 922, 934 (7th Cir. 1994) ("The test for a violation of § 8(a)(1) is not whether an employer intended to interfere with its employee's activities, or whether any interference or coercion actually occurred. Rather, it is whether the employer's actions 'reasonably tended to interfere with or coerce employees in the exercise of their protected rights.' "). Thus, contrary to the Eleventh Circuit's reasoning, it is irrelevant that Petitioners did not allege that United imposed unsatisfactory employment terms and conditions on the SAM employees for the purpose of influencing or coercing their unionization, and United's conduct is not, as the court below stated, the same as "[a]ny act whatsoever taken by an employer [that] might influence an employee's decision on union representation." (*Opinion* at 8-9). Indeed, United has sent a direct

message to its non-unionized employees that their right to reject a union is utterly meaningless.

It is also entirely beside the point whether or not the terms of the ESOP are satisfactory to the SAM employees. An unassailable principle of labor law is that an employer's conferral of even more favorable terms and conditions of employment can be as coercive as the imposition of adverse terms. In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), this Court stated in an analogous context that "[e]mployees are not likely to miss the inference that the source of [increased] benefits conferred [by employers] is also the source from which future benefits must flow and which may dry up if it is not obliged." Similarly, non-unionized employees are not likely to miss the inference that a union is the "source of benefits conferred" when an employer negotiates with that union concerning their wages and other employment terms. For this reason, federal labor law prohibits employers from doing so, regardless of the nature of the resulting agreement. *See Welch Scientific Co. v. NLRB*, 340 F.2d 199 (2d Cir. 1965).

In *Welch Scientific Co.*, the Second Circuit held that an employer unlawfully interfered with the self-determination rights of non-unionized employees in its New York facility by applying to those employees the terms of a contract with a union representing the employer's Chicago employees. In that case, the employer had given the New York employees a nickel per hour raise pursuant to agreement with the union. Citing *Exchange Parts*, the court held that "the vice president's announcement that, as part of the contract with [Chicago] Local 325, the New York employees would receive a five cent an hour raise

was likewise contrary to Section 8(a)(1)." *Id.* at 203. As *Welch Scientific Co.* illustrates, the SAM employees did not have to allege the imposition of adverse terms and conditions of employment to state an actionable RLA claim against United.

The court below also erred in concluding that RLA protection does not apply because the SAM employees lacked a "true [bargaining] representative." (*Opinion* at 7). Under this rationale, employers would not be liable for recognizing a minority union where *no* union has exclusive bargaining status. This is not the law. *See Black Grievance Comm. v. NLRB*, 749 F.2d at 1076. The dangerous precedent set by the Eleventh Circuit is that employers can negotiate with an uncertified union – even though the union has no duty of fair representation to the non-unionized employees – *as if* the union were the employees' collective bargaining representative. Supreme Court review is therefore necessary to prevent the Eleventh Circuit's decision from encouraging conduct by employers and unions directly at odds with the fundamental policies of federal labor law.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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April 2, 1997

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BERNA KAHN TEE, BEVERLY YAGER, DANNY CICCARIELLO, JUDITH A. MURPHY, FRANK PAGON, and JAN CHASE, on behalf of themselves and all others similarly situated, Plaintiffs, vs. UAL CORPORATION and UNITED AIRLINES, INC., Defendants.	CIVIL ACTION CASE NO. 1 95-CV-0054-ODE

COMPLAINT

(Filed Jan. 11, 1995)

Plaintiffs, BERNA KAHN TEE, BEVERLY YAGER, DANNY CICCARIELLO, JUDITH A. MURPHY, FRANK PAGON, and JAN CHASE, on behalf of themselves and all others similarly situated, by their attorneys, file this complaint seeking damages and declaratory and injunctive relief. Plaintiffs allege upon knowledge with respect to their own acts and upon information and belief as to all other matters, as follows:

INTRODUCTION

1. This is an action brought by Plaintiffs on behalf, of themselves and other similarly situated employees of United Airlines, Inc. to redress violations of their rights

secured by the Railway Labor Act, 45 U.S.C. §151 *et. seq.*, as amended ("RLA").

2. Defendants UAL Corporation and its wholly owned subsidiary, United Airlines, Inc., have knowingly and flagrantly violated the RLA by bargaining and reaching agreement with unions that do not represent Plaintiffs and putative class members concerning their wages, benefits and other terms and conditions of employment.

3. Defendants have bargained and entered into such agreements in spite of their awareness that it was unlawful to do so, and in callous disregard of the fact that Plaintiffs and putative class members have repeatedly and consistently exercised their statutory rights to reject union representation for collective bargaining purposes. Defendants' actions, therefore, constitute a wilful and wanton violation of the RLA, Section 2, Third and Fourth, 45 U.S.C. §152, Third and Fourth.

4. As a direct and proximate result of Defendants' unlawful acts, Plaintiffs and putative class members have suffered substantial damages in the form of wage and benefit reductions and work rule changes. They will continue to suffer such damages in the absence of the declaratory and injunctive relief sought herein.

THE PARTIES

CLASS REPRESENTATIVE PLAINTIFFS

5. Plaintiff Berna Kahn Tee is a resident of Miami, in Dade County, Florida and was and is a member of the craft or class of Customer Service Employees of United Airlines, Inc. at all material times.

6. Plaintiff Beverly Yager is a resident of Key Largo, in Monroe County, Florida and was and is a member of the craft or class of Customer Service Employees of United Airlines, Inc. at all material times.

7. Plaintiff Danny Ciccariello is a resident of Oakland Park, in Broward County, Florida and was and is a member of the craft or class of Customer Service Employees of United Airlines, Inc. at all material times.

8. Plaintiff Judith A. Murphy is a resident of Miami, in Dade County, Florida and was and is a member of the craft or class of Customer Service Employees of United Airlines, Inc. at all material times.

9. Plaintiff Frank Pagon is a resident of Miami, in Dade County, Florida and was and is a member of the craft or class of Customer Service Employees of United Airlines, Inc. at all material times.

10. Plaintiff Jan Chase is a resident of Miami, in Dade County, Florida and was and is a member of the craft or class of Customer Service Employees of United Airlines, Inc. at all material times.

DEFENDANT

11. UAL Corporation is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business outside the State of Georgia. It is a holding company, and its principal wholly-owned subsidiary is United Airlines, Inc., a corporation also duly organized and existing under the laws of the State of Delaware, with its principal place of business outside the State of Georgia.

12. UAL Corporation at all material times exercised complete and virtual control over United Airlines, Inc. in regard to decisions affecting Plaintiffs' wages, benefits, and other terms and conditions of employment. At all material times and for all purposes relevant to the claims asserted herein, UAL Corporation and United Airlines, Inc. were and are a single employer under the RLA. UAL Corporation was and is alter ego of United Airlines, Inc., and/or UAL Corporation was and is an agent for United Airlines, Inc. acting within the scope and authority of its agency. Defendants are referred to collectively hereinafter as "United."

13. United is a "carrier" as defined under the RLA, Section 1, First, 45 U.S.C. §151, First.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all similarly situated non-union employees of United who were covered by the RLA and adversely affected by United's RLA violations, in connection with the recapitalization and "employee buy-out" of the carrier implemented on July 12, 1994.

15. This action is properly maintainable as a class action for the following reasons:

a. The class of employees for whose benefit this action is brought is so numerous that joinder of all class members is impracticable. United has approximately 24,000 non-union employees, the vast majority of whom are covered by the RLA and properly includable in the

class. Members of the class are scattered throughout the United States.

b. There are questions of law and fact which are common to the members of the class and which predominate over any questions affecting any individual members. The common questions include, *inter alia*, whether United violated the RLA by bargaining and reaching agreements with unions that did not represent Plaintiffs concerning their wages, benefits, and other terms and conditions of employment.

c. Plaintiffs are long-term United employees who will fairly and adequately protect the interests of the class. Plaintiffs' claims are typical of the claims of the class.

d. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel experienced in litigation of this nature. Accordingly, Plaintiffs are adequate representatives of the class and will fairly and adequately protect the interests of the class.

e. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class, which would establish incompatible standards of conduct for the parties opposing the class.

f. United has acted and continues to act on grounds generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.

16. For the reasons stated herein, a class action is superior to other available methods for the fair and efficient adjudication of this action.

JURISDICTION AND VENUE

17. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332 and 1337.

18. Venue is proper in this district pursuant to 28 U.S.C. §1391(b), as this civil action is one wherein jurisdiction is not founded exclusively on diversity of citizenship.

19. Defendants are registered to do business and are doing business within the Northern District of Georgia, Atlanta Division, and may be served with process in this action by serving its Registered Agent for service of process, CT Corporation and/or Prentice Hall Corporation.

SUBSTANTIVE ALLEGATIONS

20. Plaintiffs and putative class members (collectively "Plaintiffs") are United employees and employees as defined under the RLA, Section 1, Fifth, 45 U.S.C. §151, Fifth.

21. During the last twenty years, several unions have attempted unsuccessfully to organize for collective bargaining purposes various crafts or classes of United employees to which Plaintiffs belong.

22. One union that has made such unsuccessful organizing efforts is the International Association of

Machinists & Aerospace Workers ("IAM"). The IAM, which already represented United's mechanics and related employees at all relevant times, made an unsuccessful attempt as recently as 1991 to organize the craft or class of Customer Service Employees to which many Plaintiffs belong.

23. In response to each unsuccessful union organizing attempt, United vigorously sought to persuade Plaintiffs that their employment interests were best served by allowing United to treat them unilaterally in regard to their wages, benefits and other terms and conditions of employment. Thus, United urged Plaintiffs to vote against representation by the IAM and other unions, stating that it was unnecessary and counter-productive to involve third parties in dealings between United and the crafts or classes, of Plaintiffs to whom the organizing efforts were directed.

24. In reliance upon United's campaign efforts and its representations that the carrier would strongly prefer to treat them unilaterally, Plaintiffs rejected representation by the IAM and other unions.

25. Plaintiffs consistently rejected union representation, despite the relatively greater benefits and protections negotiated by unions on behalf of other crafts or classes of United employees. While Plaintiffs loyally maintained their non-unionized status, however, United repeatedly made concessions in collective bargaining with unions representing other crafts or classes of employees which compromised the productivity of the carrier, adversely affected its competitive position in the

airline industry, and jeopardized United's long-term future.

PREVIOUS HOSTILE TAKEOVER ATTEMPTS BY UNITED PILOTS

26. In March 1987, United's pilots, represented by the Airline Pilots Association, International ("ALPA"), attempted to purchase United by means of a heavily leveraged Employee Stock Option Plan (ESOP). In response to this attempt, United and the IAM included in their collective bargaining agreement an anti-takeover provision, which stated that if United offered an ESOP to any group of unionized employees, it would be required to offer a similar, but potentially far more advantageous, plan to every other unionized group of employees.

27. ALPA challenged the anti-takeover provision in federal court on the grounds that it violated the RLA. Affirming the judgment of the federal district court, the Seventh Circuit Court of Appeals decided that the anti-takeover provision was indeed an RLA violation, because it purported to govern terms and conditions of employment for the pilots without first negotiating with their collective bargaining representative.

28. As a result of the 1989 decision of the Seventh Circuit Court of Appeals, United was well aware that it is unlawful for a carrier to negotiate with a union over wages, benefits, and other terms and conditions of employment for employees who are not represented by the union. United knew, therefore, that it would be unlawful to bargain with ALPA and the IAM regarding Plaintiffs' wages, benefits and other terms and conditions

of employment, especially in light of Plaintiffs' consistent rejection of collective bargaining representation.

THE 1994 ESOP NEGOTIATED AMONG UNITED, ALPA AND THE IAM

29. Operating under collective bargaining agreements that greatly hampered its productivity, and faced with the urgent need to cut costs in an increasingly competitive market, United implemented a drastic cost reduction program in January 1993. The carrier then asked its three unions for wage, benefit and work rule concessions. ALPA, the IAM, and the Association of Flight Attendants ("AFA"), representing the craft or class of United flight attendants, all rejected this request. Finally, in the Spring of 1993, unable to reach agreement with the unions, the carrier invited them to consider a "shared solution" to United's problems.

30. On July 16, 1993, a coalition of the three United unions proposed a restructuring plan predicated upon "employee investments" by the unions and the non-unionized salaried and management employees ("SAM"), a category of employees to which Plaintiffs belong. As originally proposed, the "investments" would produce an aggregate of $3.345 billion in employee cost savings over five years.

31. On August 25, 1993, after retention of financial counsel and consideration of the carrier's options by its Board of Directors (the "Board"), United responded to the unions' July 16, 1993 proposal. United's counter-proposal included a condition that "there would be no other wage rate, per diem, allowance/premium or benefit increases

during the investment period (other than step, longevity, or comparable increases for non-contract [SAM] employees or status/promotional increases)."

32. On September 30, 1993, the AFA dropped out of the negotiations, disenchanted with United's decision to open a flight attendant domicile in Taiwan. United then continued discussions with ALPA and the IAM (hereinafter the "Coalition"). The parties made no effort even to include a SAM representative in the discussions. At one point in the negotiations, Stephen M. Wolf, United's erstwhile Chairman of the Board and Chief Executive Officer, announced that ***he*** would represent the interests of non-unionized employees. Mr. Wolf himself, in addition to other senior management officials at United, realized a personal benefit from the recapitalization worth tens of millions of dollars.

33. Following another exchange of proposals, the Coalition made a formal proposal on November 11, 1993. It provided that ALPA, the IAM ***and*** SAM employees would make wage concessions with a present value of approximately $2.874 billion. The unions withdrew this proposal when United sold its flight kitchen operations over their objections. Negotiations quickly resumed, however, and United's Board met again on December 16, 1993 to discuss a "Revised Coalition Proposal." At the conclusion of this meeting, the Board instructed the carrier's representatives to continue to negotiate open issues.

34. An Agreement in Principle ("Agreement") was executed on December 22, 1993 by United, ALPA, and the IAM. The Agreement, which was in letter form from

ALPA and the IAM to United's Board, includes agreement between the unions and United to execute new collective bargaining agreements reflecting newly negotiated wage rates, benefits, and other terms and conditions of employment. The unions then recite United's agreement to "establish appropriate employment terms for the salaried and management employees as described in Exhibit E-3 [to the Agreement]."

35. Following execution of the Agreement, the parties proceeded to draft definitive documentation. This process culminated in the execution by the IAM, ALPA, and United of an Initial Plan of Recapitalization ("Initial Plan") dated March 25, 1994. In the meantime, in late January, the IAM membership and ALPA's duly authorized bargaining committee each voted to ratify the Agreement. Despite subsequent misrepresentations to United stockholders and the public that all United employee groups had approved the Agreement, no vote was taken among SAM employees.

36. Certain significant issues remained unresolved in the final days preceding execution of the Initial Plan. On March 14, 1994, the Board met to discuss these issues, which included certain issues relating to the investment by SAM employees.

37. After the March 14, 1994 Board meeting, United and the Coalition continued to discuss various issues, including principally the SAM employees' contribution.

38. On March 24, 1994, the Board met again to discuss the proposed transaction, focusing on issues that had either been resolved since the March 14 Board meeting or that remained unresolved, including the nature of

the SAM employee concession package. After discussion, the Board voted to approve the definitive documentation for the recapitalization, accepting the Coalition's final proposals on issues unresolved during the parties' discussions in the interim between the March 14 and March 24 Board meetings, *including the previously unresolved question of the nature of the SAM employee concession package.* Thus, United accepted the Coalition's final proposal regarding the SAM employee concession package.

39. On June 2, 1994, the parties amended the Initial Plan in certain immaterial respects. The Amended and Restated Plan of Recapitalization ("Final Plan") states on page A-11 that "[t]he ESOP program is designed to deliver equity ownership and voting power to the employee groups in pre-negotiated proportions and at a pre-negotiated pace." The "employee groups" to which the Final Plan refers include the SAM employee group to which Plaintiffs belong.

40. The Final Plan negotiated and executed between United and the Coalition of ALPA and the IAM, neither one of which unions is duly certified to bargain with United regarding Plaintiffs' wages, benefits, and other terms and conditions of employment, includes drastic wage and benefit reductions and work rule changes adversely affecting Plaintiffs.

41. On July 12, 1993, immediately following approval of the Final Plan by its stockholders, United implemented the negotiated wage and benefit reductions and work rule changes affecting Plaintiffs.

42. United's covenants in the Final Plan regarding wage and benefit reductions for the SAM employee

group survived implementation of the Final Plan. The covenants are binding upon United for a period of five years, nine months, absent future participation in the "employee buy-out" by the AFA-represented flight attendants. If the flight attendants choose to participate, United's covenants are binding for a slightly reduced period of time.

43. United's covenants in the Final Plan regarding wage and benefit reductions for the SAM employee groups are also judicially enforceable against United by the ESOP Trustee, State Bank of Boston.

44. By entering into its unlawful agreement with the Coalition, United both violated its obligation to treat Plaintiffs unilaterally and sacrificed its right to do so for the entire length of the "investment" period for SAM employees.

CLAIMS FOR RELIEF

COUNT I

45. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations set forth in paragraphs 1 through 44 above.

46. Section 2, Third of the RLA provides that

> "[r]epresentatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in anyway interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this

> chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

47. United violated Plaintiffs' rights under Section 2, Third of the RLA, by bargaining and reaching agreements with unions, which were not certified to represent Plaintiffs for collective bargaining purposes, concerning Plaintiffs' wages, benefits, and other terms and conditions of employment.

48. Plaintiffs have suffered substantial financial injury as a direct and proximate result of United's violations of Section 2, Third, and they will continue to suffer such injury in the absence of the relief sought herein.

COUNT II

49. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations set forth in paragraphs 1 through 44 above.

50. Section 2, Fourth of the RLA provides in pertinent part that

> "[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor

> organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work thereof, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . . "

51. United violated Plaintiffs' rights under Section 2, Fourth of the RLA, by bargaining and reaching agreements with unions, which were not certified to represent Plaintiffs for collective bargaining purposes, concerning Plaintiffs' wages, benefits, and other terms and conditions of employment.

52. Plaintiffs have suffered substantial financial injury as a direct and proximate result of United's violations of Section 2, Fourth, and they will continue to suffer such injury in the absence of the relief sought herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

> (i) For an order that this action is properly maintainable under Fed.R.Civ.P. 23 (a) and 23 (b) (3), and appointing Plaintiffs to represent the class of all similarly situated United employees;
>
> (ii) For compensatory damages in an amount to be determined at trial, together with

interest thereon, plus special, consequential and incidental damages;

(iii) For preliminary injunctive relief to restore the *status quo* pending prosecution of the claims asserted herein, as authorized by the RLA, and specifically to enjoin United's continuing adherence to the wage and benefit reductions and work rule changes affecting Plaintiffs under the Final Plan;

(iv) For permanent injunctive relief against United's adherence to the wage and benefit reductions and work rule changes affecting Plaintiffs, for the length of the time period during which United would otherwise adhere to such unlawfully agreed to changes under the Final Plan;

(v) For punitive damages to deter United from knowingly committing future flagrant violations of the federal labor laws in conscious disregard of its employees' rights;

(vi) For costs of suit and reasonable attorneys' fees; and

(vii) For such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury in accordance with Fed.R.Civ.P. 38(b).

Respectfully submitted,

HERMAN, ROOF, GARDNER
and BOCHER

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BERNA KAHN TEE, BEVERLY YAGER, DANNY CICCARIELLO, JUDITH A. MURPHY, FRANK PAGO, and JAN CHASE, on behalf of themselves and all others similarly situated	:	CIVIL NO. 1:95-CV-0054-ODE
v.	:	
UAL CORPORATION and UNITED AIRLINES, INC.	:	

ORDER

(Filed Sep. 1, 1995)

This action under Sections 2, Third and 2, Fourth of the Railway Labor Act (the "RLA"), 45 U.S.C. §152 (Third), (Fourth), is before the court on Defendants' Motion to Dismiss for failure to state a claim on which relief can be granted. Because the court believes it can adequately decide this matter based on the pleadings and briefs of the parties, Plaintiffs' motion for oral argument is denied.

The court treats the following assertions in Plaintiffs' complaint as true: Plaintiffs and putative class members (collectively "Plaintiffs") are United Airlines ("United") employees who qualify as "employees" under the RLA, Section 1, Fifth, 45 U.S.C. §151 (Fifth). The various crafts and classes of employees at United that Plaintiffs represent for purposes of this lawsuit, collectively known as salaried and management employees ("SAM"), are not

members of a collective bargaining unit, despite organizing efforts by United's unions. One union at United, the International Association of Machinists and Aerospace Workers ("IAM"), attempted to organize this group of employees as recently as 1991.

In January 1993, United implemented a drastic cost reduction program and asked its three unions for wage, benefit and work rule concessions. This request was rejected by the IAM, the Association of Flight Attendants ("AFA"), and the Airline Pilots Association, International ("ALPA"). In the spring of 1993, United invited its unions to instead consider a "shared solution" to the problem. (Compl. ¶29). In response, they proposed a restructuring plan predicated upon "employee investment" by the unions and the non-unionized employees. United offered a counter-proposal on August 25, 1993, that included a condition that "there would be no other wage rate, per diem, allowance/premium or benefit increases during the investment period (other than step, longevity, or comparable increases for non-contract [SAM] employees or status/promotional increases)." (Compl. ¶31)

Although the AFA dropped out of the negotiations, United continued discussions with the IAM and ALPA, but without any SAM representative. At one point, Stephen M. Wolf, United's Chairman of the Board and Chief Executive Officer, announced that he would represent the interests of the non-unionized employees. (Compl. ¶32)

A formal proposal was made on November 11, 1993, that provided that ALPA, the IAM and SAM employees would make wage concessions. An Agreement in Principle was executed on December 22, 1993, by United,

ALPA, and the IAM in the form of a letter from the two unions to United's Board of Directors. This included an agreement to execute new collective bargaining agreements reflecting the newly negotiated wage rates, benefits and other terms of employment, and recited United's agreement to "establish appropriate terms for the salaried and management employees as described in Exhibit E-3 [to the Agreement]." (Compl. ¶34).

The final agreement, known as the Initial Plan of Recapitalization ("the Plan"), was executed by the Board on March 25, 1994. The nature of the SAM employee concession package was not finalized until this meeting. The Plan was amended in immaterial respects on June 2, 1994, before being approved by United's stockholders on July 12, 1994. United implemented the Plan immediately, negotiating wage and benefit reductions and work rule changes that adversely affected the terms and conditions of Plaintiffs' employment. These terms are binding on United for approximately five years.[1]

Plaintiffs allege that, in negotiating with the IAM and ALPA concerning the terms and conditions of SAM's employment, United violated Section 2, Third and Section 2, Fourth of the RLA. Defendants now move to dismiss this action on the grounds that 1) it is barred by the statute of limitations; and 2) Plaintiffs have failed to state a claim upon which relief can be granted. The court finds that it cannot conclude with certainty that this action is untimely based upon the pleadings. Because Plaintiffs'

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[1] If the flight attendants choose to participate in the program, these covenants are binding for a slightly reduced period of time.

claims fall neither within the explicit language of the RLA nor its parameters as interpreted by the courts, however, the court agrees that Plaintiffs have failed to state a claim on which they can be afforded relief under the law.

I. Timeliness of Plaintiffs' Complaint

The parties agree that the appropriate period of limitation for a claim arising under the RLA is six months as set forth in Section 10(b) of the National Labor Relations Act. *Railway Labor Executives' Ass'n v. Southern Ry. Co*, 860 F.2d 1038 (11th Cir.). The period begins to run "when the plaintiff was or should have been aware of the acts constituting the alleged violation." *Proudfoot v. Seafarer's Int'l Union*, 779 F.2d 1558, 1559 (11th Cir. 1986).

Courts often look to the law developed under the National Labor Relations Act for guidance in interpreting similar provisions of the RLA. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). Applying the same period of limitation to unfair labor practices, the NLRB considers the six month period to begin running only after the party adversely affected receives "clear and unequivocal" notice of the violation of the NLRA. *Leach Corp.*, 312 N.L.R.B. 990, 991 (1993). Defendants bear the burden of establishing that Plaintiffs received the appropriate notice. *Id.*

Defendants argue that Plaintiffs' must have known of their cause of action no later than March 25, 1994, the date on which Defendants completed their negotiations with the unions and executed the Plan of Reorganization. Plaintiffs, on the other hand, contend that their claims arose when the Plan was approved and took effect on

July 12, 1994. Because Plaintiffs filed suit in January, 1995, Defendants would have to show that Plaintiffs "clearly and unequivocally" were aware by March, 1994, that Defendants were negotiating over Plaintiffs' terms of employment. While the court agrees with Defendants that in all likelihood Plaintiffs were or should have been aware of United's activities prior to shareholder approval of the Plan, there is nothing in the pleadings establishing this fact. As such, the court must deny Defendants' motion to dismiss on this ground.

II. Rule 12(b)(6) Motion

"A complaint may not be dismissed under Fed.R.Civ.P. 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Rosen v. TRW. Inc.*, 979 F.2d 191, 194 (11th Cir. 1992) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "All well-pleaded facts in plaintiff['s] complaint and all reasonable inferences drawn from those facts are taken as true." *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) (citation omitted), *cert. denied*, ___ U.S. ___, 123 L. Ed. 2d 153 (1993).

There is nothing in the plain language of the RLA which provides Plaintiffs with a viable claim based on the pleadings. Section 2, Third of the RLA provides:

> [r]epresentatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall interfere with, influence, or coerce the other in its

> choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Nowhere in the pleadings, however, do Plaintiffs allege that United at any time considered the IAM or ALPA to be the "representatives" of SAM or attempted to deal with them as such.[2] "Representative" is defined under 45 U.S.C. §151 (Sixth) to mean "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees to act for it or them." *Id.* There is no allegation in the complaint that United recognized ALPA or the IAM as acting for SAM, and in fact, the Plan of Reorganization on which Plaintiffs rely expressly provides that ALPA and the IAM were acting as representatives of the respective employee groups that they are certified to represent.[3]

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[2] Even if Plaintiffs had alleged that United treated the IAM or ALPA as SAM's representative, the proper forum for redress lies with the National Mediation Board which has exclusive jurisdiction to resolve representation disputes. *See International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983).

[3] In their Complaint, Plaintiffs allege the existence of the Plan of Reorganization and quote from it. Defendants' placement of the entire text of this document before the court is proper pursuant to a 12(b) motion given that it is central to Plaintiffs' case. *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993).

Similarly, Section 2, Fourth of the RLA provides:

> "employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work thereof, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . "

Plaintiffs, however, do not allege that the Plan implemented by United prohibits non-union employees from selecting a collective bargaining representative under the RLA.

What Plaintiffs do allege is that the statute creates a right to reject representation, and that a "necessary corollary" of this right is to prohibit the carrier from entering into agreements with other unions that affect the terms and conditions of employment of the non-unionized employees. It seems, therefore, that Plaintiffs concede that their cause of action is not covered by the direct language of the statute and must instead be found through court interpretation of the RLA. An examination

of the cases relied on by Plaintiffs, however, reveals that they also provide no legal basis for Plaintiffs' claims.

Plaintiffs rely heavily on *Air Line Pilots' Association International v. UAL Corp*, 874 F.2d 439 (7th Cir. 1989), to show that there is legal support for the position that United may not bargain with one union over the terms and conditions of employment of another under the RLA. In that case, ALPA attempted to purchase United by means of a heavily leveraged employee stock ownership plan ("ESOP"). In an attempt to stop them, United and the IAM included a provision in their collective bargaining agreement that if United offered ESOP to any group of unionized employees, it would be required to offer a similar ESOP to every other unionized group of employees. The Seventh Circuit held that in doing so, United had bargained with the IAM over the employment terms of employees represented by ALPA in violation of the RLA. Because the stock was required to be issued in proportion to the amount of wages and benefits each employee group gave up, the "interests that the employees acquire in the ESOP . . . will thus be substitutes for wages," i.e. ESOP conditions affected the terms and conditions of employment of other unions.

Plaintiffs' reliance on this case is misplaced. Because United's pilots had designated ALPA as their collective bargaining agent, United had to deal exclusively with ALPA concerning any terms or conditions of the pilot's employment under §2, First and §2, Ninth of the RLA. *See UAL Corp.*, 874 F.2d at 439. In contrast, SAM is non-union and has no designated representative with whom United must bargain. Thus, the basis for the decision in *UAL Corp.*, Sections 2, First and Ninth of the RLA, are lacking

in this case and the decision can provide no grounds for granting Plaintiffs' requested relief.

In support of their contention that the RLA forces an employer to deal with non-unionized employees unilaterally, Plaintiffs also cite several cases which conclude that because the RLA requires an employer to deal only with the true representative of the employees, there is a corresponding duty to deal with no other representative. *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 548 (1936). This proposition, while undoubtedly true, provides no legal basis for Plaintiffs' claims. Again, because Plaintiffs rejected collective representation, they had no "true representative" with whom United had to deal under the RLA. Plaintiffs have not alleged, moreover, that United treated its unions as representatives of Plaintiffs in negotiating to set the terms and conditions of SAM's employment. On the contrary, United's President stated that he considered himself to be Plaintiff's representative. As such, the unions represented the interests of their membership and United represented both its and its non-unionized employee's interests.

The Plaintiffs maintain that because collective bargaining agreements prevent the employer from negotiating directly with the employees, it must be true that the employer cannot negotiate with the union where the employees have rejected collective bargaining. *See Virginia Ry. Co.*, 300 U.S. 539-40; *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1943). The second proposition, however, does not follow from the first. An employer may not deal directly with employees who are represented by a union because it is prohibited from doing so under the provisions of Section 2, First and 2, Ninth requiring the

employer to deal exclusively with the unions. Again, there is no corresponding duty in this case because Plaintiffs have decided not to designate a collective bargaining representative.

In short, there simply is no authority for the proposition that the RLA governs a carrier's conduct in setting employment terms for its unrepresented employees. It is clear that §§2, Third and Fourth encompass the right to reject collective representation. *Brotherhood of Ry. & S.S. Clerks v. Assoc. for the Benefit of Non-Contract Employees*, 380 U.S. 650, 669 n.5 (1965); *Russell v. National Mediation Bd.*, 714 F.2d 1332, 1343-44 (5th Cir. 1983). The statute does not portend to govern labor relations, however, once employees assert this right.

In *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942), the non-unionized employees asked the employer for a conference to negotiate an agreement concerning working conditions and other related subjects. Subsequent to this request, the employer implemented an accounting and guarantee plan without consulting the union. While the union claimed this violated the first six paragraphs of Section 2 of the RLA, the Court held otherwise.

> Because the carrier was, by the act, placed under the duty to exert every effort to make collective agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated . . . the Railway Labor Act *dealt with*

> *collective bargaining agreements only and not with the employment of individuals.*

Id. at 402 (emphasis added).[4]

In *International Brotherhood of Teamsters v. Brotherhood of Railway, Airline & S.S. Clerks*, 402 F.2d 196, 202 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 848 (1968), the court held that the N.L.R.B. had the implied power under the RLA to decertify unions and represent to the employer that "a particular group of employees has no representative to carry on the negotiations contemplated by the Railway Labor Act." *Id.* at 202. While this seems to indicate that a court could imply that the RLA governs Plaintiffs' claims, the court in *Teamsters* concluded that the determination that there is no designated representative would "relegat[e] the carrier and its employees to employment relationships and contracts *not presently governed by the Railway Labor Act.*" *Id.* (emphasis added).

Although United's salaried and management employees apparently consider themselves as a unit for purposes of this litigation, absent a collective bargaining

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[4] The Eleventh Circuit in *International Association of Machinists and Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos*, 924 F.2d 1005 (1991), held that the RLA precluded an employer from making unilateral changes once negotiations toward a collective bargaining agreement had begun. The court found that *Williams* had been limited by *Detroit & Toledo Shore Line Ry. Co. v. United Transportation Union*, 396 U.S. 142 (1969) to apply only in those cases where "there is absolutely no prior history of any collective bargaining or agreement between the parties on any matter." *IAM*, 924 F.2d at 1008 (quoting *Detroit & Toledo*, 396 U.S. at 15). As this condition applies in this case, the court finds *Williams* to be relevant precedent.

agreement, they remain a collection of individuals governed by individual employment contracts. While Sections 2 Third and Fourth of the RLA are intended to protect the rights of individuals to form unions or reject collective representation, they do not give employees who have chosen to forego collective bargaining the power to assert control over the manner in which the employer determines the terms and conditions of their employment.

Simply put, Plaintiffs have not alleged in the pleadings that United either recognized its unions as the collective representative of Plaintiffs or imposed unsatisfactory terms and conditions on SAM in an effort to influence or coerce these non-unionized employees into unionizing. Only by pleading these facts would Plaintiffs' claims fall within the statutory protection afforded to non-unionized employees under the RLA. Because Plaintiffs' claims have support neither in the actual language of the statute nor its interpretation by the courts, they have failed to state a claim upon which relief can be granted. While the court may sympathize with Plaintiffs that they were not given a seat at the bargaining table, this does not alter the fact that United was under no obligation to do so absent a decision by SAM to designate a collective bargaining agent.

ACCORDINGLY, Defendants' Motion to Dismiss [5-1] is GRANTED and Plaintiffs' Motion for Oral Argument [20-1] is DENIED.

SO ORDERED, this 1 day of September, 1995.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES
DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9209
Non-Argument Calendar

D. C. Docket No. 1:95-cv-54-ODE

BERNA KAHN TEE, BEVERLY YAGER,
DANNY CICCARIELLO,
FRANK PAGON, JAN CHASE, on behalf of
themselves and all others similarly
situated,

Plaintiffs-Appellants,

versus

UAL CORPORATION, and UNITED AIRLINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed July 2, 1996)

Before EDMONDSON, BIRCH AND CARNES, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants appeal an order of the district court dismissing their complaint for failure to state a claim on which relief can be granted under Fed.R.Civ.P 12(b)(6).

In reviewing the district court's dismissal of a complaint under Fed.R.Civ.P. 12(b)(6), we accept as true all facts pleaded in the complaint and all reasonable inferences drawn therefrom. *See In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996). Dismissal under Fed.R.Civ.P. 12(b)(6) will be affirmed on appeal only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Rosen v. TRW, Inc.*, 979 F.2d 191, 194 (11th Cir. 1992), *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

United Airlines ("United") has four major employee groups represented by unions under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (the "RLA"). The pilots are represented by the Air Line Pilots Association, International ("ALPA"), the flight attendants are represented by the Association of Flight Attendants ("AFA") and both the mechanics and related employees and the ramp service and related employees are represented by the International Association of Machinists ("IAM"). Plaintiffs, six non-union customer service representatives employed by United, sought to bring a class action on behalf of United's remaining employees, none of whom are represented by a collective bargaining unit. Attempts by the IAM to organize the customer service representatives and reservation agents, as recently as 1991, had been rejected.

The putative class was to include United's customer service representatives, reservation agents, office and clerical employees, and supervisory and management employees ("Non-Union Employees").

Plaintiffs brought this action to challenge an agreement reached after negotiations between United and the IAM and ALPA.[1] The agreement involved a significant restructuring of United, employee ownership of United through an Employee Stock Ownership Plan, and wage and benefit reductions for approximately five years. Plaintiffs claim United violated Section 2, Third and Section 2, Fourth of the RLA in negotiating this agreement with the IAM and ALPA, because the provisions of the agreement affect terms and conditions of employment of the Non-Union Employees.

Simply stated, Section 2, Third[2] seeks to secure the right to designate a collective bargaining representative without interference, influence or coercion. Section 2,

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[1] AFA had participated in early negotiations but dropped out because of an unrelated issue which concerned flight attendants.

[2] RLA, §2, Third provides: "[r]epresentatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Fourth[3] seeks to reinforce the prohibition against carrier interference with employees' free choice of representatives and prohibits use of carrier funds to assist particular labor organizations, thereby fortifying independent unions rather than "company unions."

The district court noted that Plaintiffs never alleged that United considered the IAM or ALPA to be the Non-Union Employees "representative" under RLA section 2, Sixth or recognized the IAM or ALPA as acting for these employees. Nor did Plaintiffs allege that the agreement prohibits them from selecting a collective bargaining representative.

The district court concluded that nothing in the plain language of the RLA was implicated by the Plaintiffs pleadings. Instead, Plaintiffs argue that the RLA creates a right to reject representation and that a "necessary corollary" of this right is a prohibition on the carrier from entering into agreements with unions which affect the

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[3] §2, Fourth provides in relevant part: [e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class. . . . No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . . "

terms and conditions of employment of non-union employees.

We do not question that the RLA insures the option to reject collective bargaining. *See Brotherhood of Ry. & S.S. Clerks v. Assoc. for the Benefit of Non-Contract Employees,* 380 U.S. 650, 669 n. 5 (1965). Nor do we question that the RLA mandates that the carrier only negotiate with the true representative of an employee group and with no other representative. *See Virginian Railway Co. v. System Federation No. 40,* 300 U.S. 515, 548 (1936). But, as the district court concluded, this idea does not address Plaintiffs' contention. No "true representative" of the Plaintiffs existed with whom United was obligated to negotiate because the Non-Union Employees had rejected collective representation. This situation is not one where an employer's agreement with one union necessarily had an impact on the terms and conditions of employment of other unionized employees who had a different true representative. Such was the case in *Air Line Pilots' Association International v. UAL Corp.,* 874 F.2d 439 (7th Cir. 1989), upon which Plaintiffs rely. In such a situation, the employer is required to deal with the true representative of the affected union. Again, Plaintiffs did not have a "true representative" with whom United was required to deal.

In *Williams v. Jacksonville Terminal Co.,* 315 U.S. 386, 402 (1942), the Supreme Court stated that "the Railway Labor Act dealt with collective bargaining agreements only and not with the employment of individuals." While later authority limits *Williams* as a precedent, (*see Detroit & Toledo Shore Line Ry. Co. v. United Transportation Union,* 396 U.S. 142, 157-58 (1969); *International Association of*

Machinists and Aerospace Workers v. Transportes Aereos Mercantiles Pan Americandos, 924 F.2d 1005, 1007-08 (11th Cir. 1991)), when, as is the case here, the plaintiffs allege no interference whatsoever with the collective bargaining rights afforded by the RLA and when the unions were not treated or recognized as the representatives of plaintiffs, *Williams* supports the district court's conclusion that the RLA does not govern the employer's decisions as they have an impact on the individual employees composing the plaintiffs' putative class.

In this case, Plaintiffs seek to come within the ambit of the RLA by arguing that United's acts might influence or coerce the Non-Union Employees into unionizing. The district court concluded – rightly we think – that Plaintiffs did not allege in their pleadings that the agreement imposed unsatisfactory terms and conditions on the Non-Union Employees in an effort to influence or coerce them into unionizing. Any act whatsoever taken by an employer might influence an employee's decision on union representation. Just that some act was undertaken, without more, does not support a claim under the RLA.

Accepting as true all facts pleaded in the complaint, Plaintiffs have failed to state a claim on which relief can be granted. No reversible error has been shown in granting United's Fed.R.Civ.P. 12(b)(6) motion.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9209

Berna Kahn Tee, Beverly Yager,
Danny Ciccariello, Frank Pagon,
Jan Chase, on behalf of
themselves and all others
similarly situated,

Plaintiffs-Appellants,

versus

UAL Corporation, and
United Airlines, Inc.,

Defendants-Appellees.

On Appeal from the United States District Court for the Nothern District of Georgia

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(Filed Jan. 2, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: EDMONDSON, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service

on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmonson
UNITED STATES CIRCUIT JUDGE

Text of Sections 2, Third and 2, Fourth of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

"§ 152. General duties

. . .

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

. . .

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor

organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

. . . . "

US Air Gets Proposal From 3 Labor Unions For Some Concessions

By a Wall Street Journal Staff Reporter

ARLINGTON, Va. – Three of USAir Group Inc.'s labor unions yesterday gave the company a joint proposal offering substantial wage and benefit concessions, but slightly less than the $500 million sought by the airline.

Members of the Air Line Pilots Association, the International Association of Machinists and the Transport Workers Union, as expected, offered to give up a portion of their salaries in exchange for an equity stake in the financially ailing carrier. But they lowered the overall value of their concession package after the Association of Flight Attendants refused to join the coalition last week. AFA said it is meeting this week to work out a possible concession proposal of its own.

The plan by the pilots and machinists requires that all of USAir's 45,000 workers, including nonunion employees, participate in the concessions. Under the terms of the proposal, ALPA would agree to annual wage cuts of more than $180 million, or about 26% of its members' current pay and benefits. Pilots comprise about 30% of USAir's payroll, and have an average salary of about $129,000. The machinists, who make up about 19% of USAir's payroll, would concede nearly 19% of their current pay, which averages $49,000. The Transport Workers Union, which represents only 172 employees, offered a small percentage of concessions.

In return, workers would be given about 20% of USAir's common stock, as well as preferred stock, profit sharing and representation on the board. While USAir

hasn't formally signed off on the deal, chief executive officer Seth Schofield confirmed last week that the airline could give the workers as much as a 20% equity stake.

A USAir spokesman said the company received the coalition's proposal, but said the airline would have no comment on the details.

ESOP Efforts of the Air Line Pilots Association

Captain Roger D. Hall*

The Air Line Pilots Association has had a long history of involvement in employee ownership. Several of these efforts have produced beneficial results while others have not. One early attempt that worked well was an employee stock ownership plan (ESOP) that was put in place for the employees of Republic Airlines when that airline was experiencing financial difficulties. This ESOP existed for several years; and when it was finally terminated with the acquisition of Republic by Northwest Airlines, the payout was very good.

There have been other attempts at employee ownership. Employees at Continental attempted to put an ESOP in place at the time Frank Lorenzo was trying to buy the airline, but they were outmaneuvered by Mr. Lorenzo and the effort failed. The employees of Eastern Airlines had an ESOP in place that owned 25 percent of the airline but it provided little protection when Frank Lorenzo bought the carrier, and with the bankruptcy at Eastern it is expected that the employees will receive little or nothing at the end of the bankruptcy proceedings.

Another effort involved employees at TWA. The TWA employees negotiated an ESOP as part of their arrangement with Carl Icahn when he purchased the airline. This ESOP was never established and it has been

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* Captain Roger D. Hall, B.S., Bradley University, Peoria, Illinois, was elected first vice president of the Air Line Pilots Association in November 1986. He served in that position until December 1990. Captain Hall has been with United Airlines for 25 years and now flies the Boeing 737 aircraft.

tied up in various lawsuits for some time. Whether it will ever come to fruition or produce anything of tangible value is problematic.

With this background in place, the remainder of this discussion focuses on the effort started by the pilots at United Airlines and eventually joined by the rest of the work force. This effort has not yet been successful, and perhaps it may never be, yet it has proven to be very beneficial for all of the employees at United.

Back in the early 1980s, United Airlines' management and board of directors embarked upon a plan to acquire numerous travel-related businesses. Over a period of time this resulted in UAL Inc.'s (ALEGIS) owning Westin Hotels, Hilton Hotels, Avis Car Rental, and numerous other related small businesses. While such undertakings may have been good for those companies and their employees, they were working to the detriment of the employees of United Airlines.

The reason for this was that each of these acquisitions was draining cash away from the airline. It is commonly known that airlines generate tremendous amounts of cash, but they also require large cash expenditures to replace older, inefficient equipment and to expand. During the diversification program, United was not replacing aging equipment nor was it expanding. Other airlines were doing both and, in fact, American Airlines, because of its concentration on the airline business and expansion, eventually surpassed United as the world's largest airline.

During this diversification period, United's management was demanding that the employees negotiate concessionary contracts so that the airline could prosper. It seemed totally illogical that the employees were making contract concessions to help the carrier, while management was bleeding it dry of its cash resources to acquire other businesses. Additionally, since management's action would lead to the eventual decay of the airline, these activities not only were detrimental to the interests of the employees, but they were also detrimental to the interests of the shareholders and the traveling public.

It was at this juncture that the pilots of United began their efforts to acquire the company. Once the airline was "put in play," other stockholders bought large blocks of stock and made certain demands upon the board. All of this activity led the board to renounce the diversification strategy and to sell the extraneous assets. It would have been best for the airline if the employees had acquired the airline and been able to use the proceeds from these sales to purchase new aircraft and facilities but, unfortunately, the proceeds were distributed to the shareholders. One positive outcome, however, was that the cash drain was halted and the resources were once again available to meet the needs of the airline. In fact, new aircraft were ordered and United began to expand so that by mid-1990 it had regained its position as the largest airline in the United States.

Another beneficial result of employees' efforts to acquire the company was that in this process the management team that had led the airline down this destructive path was replaced. It happens very seldom in this country that the employees of a company can cause the senior

management group to be replaced. While this was not accomplished as a result of the employees' efforts alone, it was the employees who started the process that led to this result and it would not have happened without their activities.

While the employees' ultimate objective – ownership and the ability to influence the future of the company – was not realized, the effort did achieve the noted important results on behalf of the employees at United. I believe that employee ownership efforts are valuable tools for labor groups to use to achieve their objectives. Even though these efforts may not accomplish the objective of ownership, there are other aspects of the attempt which are beneficial.

If ownership is desired, then the employee group should consider acquiring a majority of the stock. Too many situations occur in which minority ownership positions do not afford the employees any protection or input. The employees make concessions, but the concessions buy them very little in terms of the real reasons that cause employees to consider an ownership position. Finally, although the economic conditions are not right at this time for major ownership deals, employee ownership through an ESOP is a desirable goal and a useful negotiating strategy when the climate improves; and we intend to support our groups in their efforts to attain ownership positions.

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Wednesday, January 17, 1996

USAir Picks Wolf, Industry Veteran, As Chief in Bid for Labor Cost Savings

By Carl Quintanilla and Joann S. Lublin
Staff Reporters of The Wall Street Journal

Corrections and Amplifications

RICHARD FERRIS, a former chairman of UAL Corp., was responsible for the company's purchase of Pacific routes from Pan American World Airways in 1985. An article Jan. 17 incorrectly stated the routes were bought by Stephen M. Wolf, who succeeded Mr. Ferris as chairman in 1987 and who has just been named chairman of USAir Group Inc. (WSJ Feb. 7, 1996)

USAir Group Inc. tapped Stephen M. Wolf, an industry veteran who ran UAL Corp. until 1994, as its new chairman and chief executive officer.

The nation's sixth-largest airline said Mr. Wolf, 54 years old, will join the Arlington, Va.-based airline Monday, succeeding Seth E. Schofield, a career employee of USAir and its chief executive since 1991. Mr. Schofield, who had come under fire for failing to obtain cost-saving concessions from the airline's unions, said four months ago that he planned to step down after a successor was named.

Mr. Wolf, a savvy strategist known for his iron-fisted approach to labor, masterminded an employee buyout of UAL's United Airlines unit two years ago. USAir said Mr. Wolf was its leading candidate since the start of its search to replace Mr. Schofield. USAir's directors approved the appointment yesterday.

"He has clearly demonstrated his ability to lead a major carrier and to add shareholder value in past executive positions," said Mathias J. DeVito, a USAir director and head of the five-member search committee. Added Mr. Schofield: "He is ideally suited to carry on the restructuring of USAir."

With a resume that reads like a who's who in aviation, Mr. Wolf has emerged as a trouble-shooter who can turn around ailing carriers, force wage concessions from workers and develop international markets. USAir is in need of a stern executive to help tame its strong unions and pare its costs, which are among the highest in the industry.

Mr. Wolf said he wouldn't comment until he met with USAir's workers.

Mr. Wolf, a multimillionaire now living on a Virginia horse farm, is expected to earn less than $600,000 a year at USAir but receive stock options on more than one million shares, according to one individual familiar with the negotiations.

Headhunters for Heidrick & Struggles Inc. initially contacted Mr. Wolf in early December. His interest in the USAir job made him the front-runner candidate – even

though he spurned similar feelers from companies outside the airline industry, the knowledgeable individual said. The search firm declined to comment.

But after 18 months in a consulting role, Mr. Wolf "just wanted to re-engage," this person continued. "He was a football player without a football team."

After joining United in 1987, Mr. Wolf built the carrier into a truly international company by buying Pacific routes from Pan American World Airways and by launching flights across the Atlantic and to Latin America. He transformed UAL into the largest employee-owned company in the U.S., wresting $4.9 billion in wages and benefits from employees in exchange for majority ownership.

Even so, union members demanded he leave the airline as part of the buyout agreement. Part of the hard feelings stemmed from the fact that he was granted a hefty severance package totaling nearly $7 million – including $4,350,000 in severance and $83,333 in "accrued but unused vacation," according to the company's 1995 proxy statement.

His welcome at USAir may be as chilly as was his exit from United. USAir's unions have shown little enthusiasm for the concessions that Mr. Schofield had claimed were vital to the company. Negotiations that dragged on for more than a year fell apart last summer, triggering Mr. Schofield's decision to leave when a successor could be found.

Since then, USAir's financial fortunes have undergone surprising improvement – the company is expected

to be in the black for all of 1995, the first profitable year since 1988. But that is expected to only stiffen the unions' resolve to resist givebacks without substantial financial returns.

The appointment of Mr. Wolf was announced after the market closed yesterday. In New York Stock Exchange composite trading, USAir stock closed at $12.625, up 12.5 cents.

But Mr. Wolf has proved himself skillful at winning concessions from recalcitrant unions over the years. He extracted concessions from workers at Tiger International, Inc., a cargo airline. He resurrected the old Republic Airlines as chairman before coming to United. Republic, which was later acquired by Northwest Airlines, was bleeding cash until Mr. Wolf persuaded workers to take a 15% pay cut, restructured its debt, changed routes and revitalized its image by repainting its planes.

"We were on death's door," said Bob Gibbons, Republic's former public relations manager. "But he got us back on our feet."

The search for Mr. Schofield's replacement has been marked by fits and starts. He initially announced his intention to retire last September. But USAir halted the hunt for two months while it engaged in fruitless takeover talks with UAL and American Airlines' parent AMR Corp. USAir has said it won't sell off the airline in pieces, but it hasn't ruled out another possible sale of the company sometime in the future.

Although it is a fraction of United's size, USAir holds several challenges that traditionally have intrigued Mr. Wolf, associates say. It is in dire need of a turnaround – of the bottom line and its reputation. It has little international exposure. And if it tries to expand its partnership with British Airways PLC, which owns 24.6% of USAir, the task will require shrewd handling to avoid raising congressional wrath over foreign ownership of air carriers.

"Steve is going back to what he does best," observed Felix Rohatyn, a managing director of Lazard Freres & Co., in an interview. For Mr. Wolf, the challenge of running another airline "is like climbing Mt. Everest," Mr. Rohatyn Added.

Mr. Wolf joined Lazard Freres as a senior adviser after leaving UAL. In that part-time role, the new USAir chief has worked mainly in Paris advising Christian Blanc, a chairman of Air France. Among other things, he helped Mr. Blanc to recruit Rakesh Gangwall, a former United executive, as an executive vice president.

Mr. Wolf has a close relationship with British Airways and its chairman, Sir Colin Marshall. Mr. Wolf nearly became a director of British Airways in 1989, when the London-based carrier led a proposed employee buyout of United. British Air, along with United's management, its pilots union and Mr. Wolf, tried unsuccessfully to buy the giant carrier in a $6.8 billion leveraged buyout.

It is unclear how Mr. Wolf's appointment will affect the USAir executive suite. People familiar with the airline said Mr. Wolf may turn to some of his former colleagues

at United. Several, including his right-hand man and president, Jack Pope, left the Chicago-based carrier in the wake of the buyout. It is understood that USAir's board voted only on Mr. Wolf's appointment yesterday.

The appointment of Mr. Wolf brings to a close Mr. Schofield's 39-year career at USAir and his tumultuous four-year reign as chairman. A former baggage handler who still answers to his nickname, "Butch", when called by employees, Mr. Schofield was at the helm as the airline encountered its most unprofitable years.

– Stephen M. Wolf's Resume

1966 to 1981: Began his career with AMR Corp.'s American Airlines, rising through the ranks to become vice president, Western Division.

1981 to 1982: Moved to Pan American World Airways as senior vice president, marketing.

1982 to 1983: President and chief operating officer at Continental Airlines.

1984 to 1986: President and chief executive officer of Republic Airlines. Convinces workers to give concessions worth $100 million and virtually saves the airline from collapse. Changes the colors of the planes, and prepares the airline for an eventual sale to Northwest Airlines.

1986 to 1987: President and chief operating officer at Tiger International Inc., parent company of air-cargo service Flying Tiger. Convinced workers to give concessions worth $50 million.

1987 to 1994: Joins UAL Corp., the parent of United Airlines, as president and chief executive officer. Becomes

chairman in 1988. Masterminds the employee-buyout of the company in 1994.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

BERNA KAHN TEE, et al.,
Petitioners,
VS.
UAL CORPORATION and
UNITED AIRLINES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do Sections 2, Third and 2, Fourth of the Railway Labor Act prohibit a carrier from entering into an agreement with a union concerning the terms under which unrepresented employees of the carrier will participate with union-represented employees in an Employee Stock Ownership Plan that will acquire a controlling interest in the carrier?

RULE 29.6 STATEMENT

United Airlines, Inc. is a wholly-owned subsidiary of UAL Corporation, a publicly traded corporation. Other subsidiaries are: Air Wis Services, Inc.; Four Star Insurance Company, Ltd.; UAL Leasing Corporation; Covia Corporation; Kion de Mexico, S.A. de C.V.; Mileage Plus Holdings, Inc.; United Airlines Credit Corporation; United Aviation Fuels Corporation; United Cogen, Inc.; United GHS Inc.; United Vacations, Inc.; United Worldwide Corporation; Air Wisconsin, Inc.; Domicile Management Services; Inc.; Mileage Plus, Inc.; and Mileage Plus Marketing, Inc.

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No. 96-1568

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

BERNA KAHN TEE, et al.,

Petitioners

v.

UAL CORPORATION and
UNITED AIRLINES, INC.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants-respondents UAL Corporation ("UAL") and United Air Lines, Inc. ("United") oppose the petition for writ of certiorari filed by plaintiffs-petitioners ("petitioners"). In this case the Eleventh Circuit determined, in an unpublished per curiam opinion, that the Railway Labor Act

does not prohibit a carrier from entering into an agreement with a union concerning the terms under which unrepresented employees of the carrier will participate with union-represented employees in an Employee Stock Ownership Plan. The Eleventh Circuit's decision poses no conflict with this Court's decisions or the decisions of any other circuit court of appeals, presents no significant legal issue and, indeed, is wholly consistent with longstanding authority of this Court and the lower federal courts construing the Railway Labor Act. Accordingly, a writ of certiorari is unwarranted.

STATEMENT OF THE CASE

Petitioners are six non-union customer service representatives ("CSRs") employed by United who allege that United violated Sections 2, Third and 2, Fourth of the Railway Labor Act, 45 U.S.C. §§ 151 et seq. (the "RLA"), by entering into an agreement with the Air Line Pilots Association, International ("ALPA") and the International Association of Machinists ("IAM") concerning the terms under which CSRs and other non-union employees of United would participate with ALPA- and IAM-represented employees in a multi-billion dollar Employee Stock Ownership Plan ("ESOP") that acquired a controlling interest in UAL during 1994. Petitioners contend that

United was obligated by the RLA to establish the terms for their ESOP participation "unilaterally" without discussing the subject with the unions which represented the other participants in the ESOP. (A 14-15.)

The District Court dismissed the Complaint on the basis that petitioners' allegations failed to state a claim under the RLA. The court noted that petitioners did not allege that United had treated ALPA or the IAM as the collective bargaining representatives of its CSRs, nor did the ESOP prohibit United's CSRs and other non-union employees from selecting, or rejecting, a collective bargaining representative if they desired. (A 23,29.) Under such circumstances, the District Court held, the RLA does not regulate the manner in which an employer sets the terms and conditions for its non-union employees, and United was not prohibited from discussing those terms with ALPA and the IAM. (A 29.)

In an unpublished per curiam decision, the Eleventh Circuit Court of Appeals upheld the District Court's ruling. The court determined that neither the terms of the RLA, nor any case law thereunder, support petitioners' contention that the RLA was intended to govern a carrier's conduct in setting employment terms for unrepresented employees. (A 33-36.)

SUMMARY OF ARGUMENT

This case presents no issue which would warrant granting the petition for writ of certiorari under Supreme Court Rule 10. As petitioners concede, they do not seek to resolve a conflict among the circuit courts of appeals because there is none. (Petition at 8.) Nor is there a significant question of federal law that requires this Court's review.

First, the Eleventh Circuit's decision is in full accord with well-settled principles under the RLA. Petitioners point to no decision of this or any court that supports their basic contention that the employees' right to reject union representation under Sections 2, Third and 2, Fourth of the RLA includes, as a "necessary corollary," the employer's obligation to refrain from discussing with a union the terms and conditions of employment by which unrepresented employees will join with union-represented employees in an Employee Stock Ownership Plan. (Petition at 15.) As the Eleventh Circuit concluded, petitioners' argument is fundamentally flawed. Although Sections 2, Third and 2, Fourth of the RLA protect the right of airline employees to organize and bargain collectively through representatives of their choosing, and to refrain from doing so if they desire, if

employees decide not to be represented by a union, the RLA does not govern how their terms of employment are to be established.

Second, petitioners attempt to establish a contrary principle premised solely on analogies to cases involving the rights of union-represented employees and involving employers governed by a separate statute, the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. ("NLRA"). These analogies are ill-founded. NLRA authority cannot be applied to the RLA in this context, and, in any event, the cases do not stand for the proposition urged by petitioners.

Third, as the Eleventh Circuit held, there is no support for petitioners' assertion that United's conduct somehow coerced them into unionizing. There is no allegation in the complaint that United treated or recognized the unions as the collective bargaining representatives of the CSRs or implemented the CSR's employment terms in an effort to coerce them to join a union. The mere fact that United implemented employment terms that some CSRs may not have liked does not constitute interference with the employees' choice; otherwise, any adverse employer actions would violate the RLA.

Finally, the Eleventh Circuit's opinion will have minimal, if any, impact

beyond the parties to this action. The lower court chose not to select its per curiam decision for official publication; therefore, the opinion neither sets precedent nor has the potential to create confusion among the lower courts, and it provides no basis for this Court's review.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 sets forth a detailed list of reasons for granting review on writ of certiorari. Although the grounds set forth in Rule 10 are not an exhaustive measure of the Court's discretion to grant review, review is granted "only for compelling reasons." Such significance may attach when a federal court of appeals has rendered a decision in conflict with another federal court of appeals, when a federal court of appeals has decided a federal question in conflict with a state court of last resort, when a federal court of appeals has markedly departed from accepted judicial practice, when a state court of last resort has decided a federal question in a manner which conflicts with the decision of another state court of last resort or a federal court of appeals, or when a state or federal court of appeals has decided an important question of federal law which should be settled by this Court or which is in conflict with pertinent decisions of

this Court. See Supreme Court Rule 10(a)-(c).

As argued below, none of the enumerated reasons for granting review obtains in this case, nor does the case present any other "compelling" reason for granting review on writ of certiorari.

I. THE ELEVENTH CIRCUIT'S DECISION IS IN ACCORD WITH THE WELL-SETTLED PRINCIPLE THAT THE RAILWAY LABOR ACT DOES NOT GOVERN A CARRIER'S CONDUCT IN SETTING EMPLOYMENT TERMS FOR NON-UNION EMPLOYEES.

In holding that petitioners' allegations did not state a cause of action under the RLA, the Eleventh Circuit followed settled principles under RLA case authority and concluded that while Sections 2, Third and 2, Fourth of the RLA are intended to protect the rights of individuals to form unions or reject collective representation, they do not govern the manner in which the carrier determines the terms and conditions of employment for unrepresented employees. (A 35-36.) There is no basis for petitioners' suggestion that this principle should be overturned.

Petitioners' argument -- that the RLA does, in fact, govern the manner in which a carrier sets employment terms for non-

union employees -- overlooks almost 70 years of jurisprudence under the RLA, during which time no court has ever held, or implied, that Sections 2, Third or 2, Fourth were intended to regulate the manner in which carriers establish the terms and conditions of employment for unrepresented employees. In fact, in the leading decision, Williams v. Jacksonville Terminal Co., 315 U.S. 386, 402 (1942), the Supreme Court held that "where no collective bargaining agreements are or have been in effect," the carrier is free to "arrange its business relations with its employees" because "the Railway Labor Act deal[s] with collective bargaining agreements only, and not with the employment of individuals." Similarly, in International Bhd. of Teamsters v. Brotherhood of Ry. Clerks, 402 F.2d 196, 202 (D.C. Cir.), cert. denied, 393 U.S. 848 (1968), the D.C. Circuit held that the National Mediation Board's determination that a carrier's employees have no collective bargaining representative "relegat[es] the carrier and its employees to employment relationships and contracts not presently governed by the Railway Labor Act."

No court has interpreted the RLA in the manner petitioners suggest. The federal courts typically have invoked Sections 2, Third and 2, Fourth in cases alleging that a carrier has interfered with its employees' rights during a union

organizing drive by discharging union supporters or similar conduct. E.g., Roscello v. Southwest Airlines Co., 726 F.2d 217 (5th Cir. 1984); Griffin v. Piedmont Aviation, Inc., 384 F. Supp. 1070 (N.D. Ga. 1974). The courts have also invoked these sections occasionally in cases following certification of a union where a carrier's conduct -- for example, the discharge of striking employees -- undermines the union's collective bargaining rights. E.g., Air Line Pilots Ass'n, Int'l v. United Air Lines, Inc., 802 F.2d 886 (7th Cir. 1986), cert. denied, 480 U.S. 946 (1987). There are, however, no decisions of which United is aware in which the courts have invoked these sections to regulate how carriers determine the terms and conditions for employment for employees who reject union representation, and at least one decision has rejected such an attempt. See Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1023 (9th Cir.), cert. denied, 494 U.S. 1016 (1990) ("No private cause of action exists under the RLA for a group of employees who assert retaliatory conduct based upon employee activities which bear no relationship to establishing a union, or to employer activities that bear no relationship to undermining a union.").[1]

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[1] Russell v. National Mediation Bd., 714 F.2d 1332, 1343-44 (5th Cir. 1983), (continued...)

Petitioners argue that although the RLA does not generally regulate the terms and conditions of unrepresented employees, a "necessary corollary" to the employees' right to decline representation is the carrier's obligation not to discuss with any union the terms and conditions of employment for employees who are not lawfully represented by that union. (Petition at 15.) Petitioners conclude that the Eleventh Circuit's decision renders "superfluous" or "meaningless" the express statutory right "not to join or remain members of any labor organization." 45 U.S.C. § 152, Fourth. (Petition at 13.) Petitioners rely for this proposition primarily on Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937) and Medo Photo

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[1](...continued)
cert. denied, 467 U.S. 1204 (1984) cited by petitioners, does not support their position. In Russell, the court found that the National Mediation Board had not properly investigated a representational dispute, thereby depriving employees of the option to vote against any representation at all in elections conducted by the National Mediation Board. The Russell decision specifically acknowledges that the RLA was intended to encourage collective bargaining. 714 F.2d at 1343-44. Russell, then, does not stand for the proposition that Congress intended the RLA to govern the manner in which carriers determine the terms and conditions of employment for unrepresented employees.

Supply Corp. v. NLRB, 321 U.S. 678 (1944). Neither case supports petitioners' claims.

The principle established in Virginian Ry., and applied in Medo Photo and the other related decisions cited by petitioners is that Section 2, Ninth of the RLA "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." 300 U.S. at 548. By its very terms, however, the affirmative obligation to treat only with the certified representative -- and thus the negative obligation to treat with no other -- arises under Section 2, Ninth only where the employees have selected a bargaining representative. Where, as here, employees have rejected representation, the obligation to treat with the certified representative does not arise, the principles of Virginian Ry. are patently inapplicable, and the RLA simply has no further application with respect to how their terms of employment are to be established.[2] This case provides no reason

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[2] Application of the principles underlying Virginian Ry. to unrepresented employees would lead to absurd results. For example, the obligation to treat with the certified union does not preclude an employer from negotiating with another union; it simply precludes such negotiations without the first union's (continued...)

for overturning these settled principles of RLA jurisprudence.

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[2](...continued)
consent. In the present case, for example, ALPA and the IAM each negotiated with United over terms applicable to all participants of the ESOP, and it would have been impossible to have established the ESOP any other way. With respect to United's unrepresented employees, however, there was no union that could have consented to such negotiations and there was no way to include the unrepresented employees in the ESOP absent discussion with the unions who would also participate.

In addition, as petitioners acknowledge, the duty to treat under Section 2, Ninth precludes a carrier not only from dealing with another union, but also from dealing with the employees directly. (Petition at 16.) See Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84 (1943)(although employees proposed wage increase, it was unfair labor practice for employer to grant wage increase to employees to induce them to leave union); Order of R.R. Telegraphers v. Telegraphers, 321 U.S. 342, 346-47 (1944)(carrier could not implement individual wage increases without notice to the employees' union representative required by RLA). If this principle were applied to unrepresented employees, as petitioners urge, an employer could not even enter into individual contracts with its unrepresented employees.

II. THE NATIONAL LABOR RELATIONS ACT CASES CITED BY PETITIONERS DO NOT APPLY TO THIS RAILWAY LABOR ACT CASE AND, IN ANY EVENT, DO NOT CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION.

Having conceded that this case poses no conflict among the federal courts of appeals (Petition at 8), petitioners nonetheless argue that the Eleventh Circuit's construction of Section 2, Third and 2, Fourth cannot be "squared" with federal court decisions that forbid an employer to bargain with a union concerning terms and conditions of employment of employees the union does not represent. (Petition at 19.) Petitioners rely exclusively on authority under the NLRA. These cases are irrelevant and inapposite, however, because NLRA authority cannot be applied to the RLA in this context, and, in any event, the cases do not stand for the proposition urged by petitioners.

This Court has cautioned that the NLRA cannot be "imported wholesale" into the railway labor arena and that even rough analogies must be drawn "circumspectly," with due regard for the many differences between the statutory schemes.[3]

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[3] For example, Section 7 of the NLRA creates an express statutory right to

(continued...)

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969). This is particularly true in the present case because virtually all of the cases cited by petitioners arise under the unfair labor practice jurisdiction of the National Labor Relations Board.[4] The RLA

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[3](...continued)
refrain from "any and all" concerted activities, whereas Sections 2, Third and 2, Fourth of the RLA contain no such provision. Thus, all of the NLRA authority cited by petitioners for this proposition is distinguishable because it relies on the express Section 7 right to refrain from concerted activities. Section 7 of the NLRA also differs from Sections 2, Third and 2, Fourth, of the RLA in that the RLA contains no general protection of concerted activities unrelated to union organization. Johnson v. Express One Int'l, Inc., 944 F.2d 247, 252 (5th Cir. 1991). The cases cited by petitioners interpreting such rights under the NLRA, e.g., Black Grievance Committee v. NLRB, 749 F.2d 1072 (3d Cir. 1984), cert. denied, 472 U.S. 1008 (1985), are therefore irrelevant to the RLA.

[4] See, e.g., Carry Cos. of Ill., Inc. v. NLRB, 30 F.3d 922 (7th Cir. 1994) (discussing coercion under Section 8 of the NLRA); International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961) (same); NLRB v. Clegg, 304 F.2d 168 (8th Cir. 1962) (same); NLRB v. Exchange Parts Co., 375 U.S. 405 (1964) (same); Welch Scientific Co. v. NLRB, 340 F.2d 199 (2d Cir. 1965) (same).

does not establish unfair labor practices as such, and this Court has cautioned that federal court jurisdiction under Sections 2, Third and 2, Fourth should be limited to those circumstances where it is necessary to enforce an express statutory command. Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426, 441 (1989). More importantly, petitioners rely principally on cases holding that it constitutes an unfair labor practice under the NLRA to recognize a union which does not have majority support. Under the RLA, the courts have no jurisdiction over such claims because they fall within the sole purview of the National Mediation Board. International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983).[5]

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[5] Thus, even if United had recognized the IAM as petitioners' collective bargaining representative (and there is no allegation it did so), such a claim would not entitle petitioners to relief in federal court. It is well established that the RLA does not prohibit a carrier from voluntarily recognizing, or bargaining with, an uncertified union as the representative of its previously non-union employees. See D. Leslie, The Railway Labor Act 199 (1995); Galveston Wharves, 4 N.M.B. 200, 203 (1962). In such a circumstance, the National Mediation Board has exclusive jurisdiction to determine whether the voluntarily recognized union enjoys support of a majority of the

(continued...)

Moreover, all of the decisions cited by petitioners involve facts that are simply inapposite to the issues in this Petition. These cases support the proposition that under the NLRA it constitutes an unfair labor practice for an employer to recognize a union that does not represent a majority of employees in the bargaining unit (see e.g., NLRB v. Clegg, 304 F.2d 168 (8th Cir. 1962)), or for a union to seek such recognition. See e.g., Sperry Sys. Management Div. v. NLRB, 492 F.2d 63 (2nd Cir.), cert denied, 419 U.S. 831 (1974). In the present case, however, there is no allegation that United recognized or dealt with ALPA and the IAM as the

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[5](...continued)
employees, and the courts are without jurisdiction. International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983). Upon application of the employees involved, the National Mediation Board would conduct an election to determine if the IAM had majority support and, if not, would certify the representative which did or declare that no union represented the employees. In re Chamber of Commerce, 14 N.M.B. 347 (1987). Thus, if United had actually done what petitioners claim to fear -- that is, to recognize the IAM as the collective bargaining representative of petitioners and other CSRs when a majority of those employees did not want union representation -- those employees would have a remedy under the RLA, but not before the federal courts.

representatives of petitioners or other non-union employees, or that the unions sought to be recognized as the CSRs' bargaining agent. Rather, as the Eleventh Circuit found, United dealt with the unions as representatives of their respective employee groups. (A 36.)

Finally, the decisions cited by petitioners that involve the negotiation of contract terms for employees that the union does not represent are consistent with the Eleventh Circuit's analysis. In both Virginia Sprinkler Co. v. Road Sprinkler Fitters Local No. 669, 868 F.2d 116, 122 (4th Cir. 1989), and Sperry Sys. Management Div. v. NLRB, 492 F.2d 63, 70 (2nd Cir.), cert. denied, 419 U.S. 831 (1974), the courts held that it would be proper for a union to seek to negotiate regarding the terms and conditions of employees it did not represent when those terms "vitally affected" the employment of employees the union did represent. See generally Allied Chemical Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971)(employment terms of those outside of bargaining unit are proper subjects of bargaining if they "vitally" affect employment terms of employees within unit; court declined to find such "vital" connection between retirees' benefits and benefits of active employees). In the present case, negotiations concerning the terms by which United would include the

non-union employees in a company-wide ESOP with union-represented employees clearly met this standard.[6]

The Eleventh Circuit correctly rejected petitioners' attempts to overturn established principles of RLA law on the basis of inapposite and inapplicable authority. Contrary to petitioners' assertion, the Eleventh Circuit's decision fully "squares" with pertinent RLA

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[6] Any prospective purchaser of equity in a corporation has a legitimate interest in the cost structure of the company it is considering buying, and agreements to maintain or reduce wages and benefits in anticipation of an acquisition are commonplace. Cf., Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999 (9th Cir. 1990) (rejecting challenge under RLA to agreement executed between ALPA and financier Carl Icahn in anticipation of Icahn's acquisition of Trans World Airlines). The fact that a third party -- be it a shareholder, a potential acquiror, or a financial institution considering a loan to the corporation -- requires the corporation as a condition of a transaction to hold wages or benefits at a specific level does not mean that the third party is negotiating on behalf of the corporation's employees. To the contrary, the third party is clearly negotiating in its own interest. The fact that the acquiror is a union representing some of the corporation's employees should not change the analysis.

authority and poses no issue warranting scrutiny by this Court.

III. THE ELEVENTH CIRCUIT CORRECTLY DETERMINED THAT UNITED'S CONDUCT DID NOT COERCE PETITIONERS IN THE EXERCISE OF PROTECTED RIGHTS UNDER THE RAILWAY LABOR ACT.

Petitioners' final argument is that United's conduct in discussing their participation in the ESOP with ALPA and IAM tended to "coerce" petitioners into unionizing in violation of Section 2, Fourth of the RLA. (Petition at 26.) Petitioners complaint contained no allegation that United imposed unsatisfactory terms on unrepresented employees in an effort to influence or coerce them into unionizing, or that United recognized ALPA and IAM as representatives of petitioners. The Eleventh Circuit's conclusion -- that absent such allegations, petitioners' complaint did not state a claim for violation of Section 2, Third or 2, Fourth -- was correct.

First, even if, as petitioners argue, some employees might view the ESOP agreement so negatively that they would elect a union to escape from it, that does not constitute a violation of the RLA. While Section 2, Fourth prohibits a carrier from interfering with the free choice of its employees to accept or reject union

representation, it certainly does not constitute interference for an employer to establish an employment policy that some of its non-union employees do not like. Otherwise, as the Eleventh Circuit noted, any "adverse" action arguably could constitute a violation of the RLA. (A-35.)

The flaw in petitioners' argument is clearly demonstrated by their assertion that it does not matter whether United's non-union employees actually objected to inclusion in the ESOP because a grant of benefits can "influence" or "coerce" employees in their choice of union representation just as easily as a denial of benefits. (Petition at 27.) Under petitioners' theory, however, it would violate the RLA even when an employer increased wages or benefits for its non-union employees because the natural effect of such increases is to discourage unionization. This cannot be the law.

Second, contrary to petitioners' argument, United's decision regarding the CSRs' participation in the ESOP did not become coercive simply because it arose in the course of union negotiations.[7] United

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[7] Again, petitioners rely exclusively on authority concerning unfair labor practices under the NLRA, which, as discussed, supra, is irrelevant in the RLA (continued...)

was obligated under Section 2, First of the RLA to negotiate with ALPA and the IAM over their ESOP proposal. Air Line Pilots Ass'n, Int'l. v. UAL Corp., 874 F.2d 439 (7th Cir. 1989). The fact that the unions' proposal was conditioned on United's compelling its non-union employees to participate in the ESOP does not alter that obligation. Under petitioners' theory, United violated Sections 2, Third and 2, Fourth of the RLA by complying with Section 2, First. As the Fifth Circuit noted under similar circumstances in Atlanta & West Point R.R. v. United Transp. Union, 439 F.2d. 73, 81 (5th Cir.), cert. denied, 404 U.S. 825 (1971), "it would be ludicrous to hold that the railroads' undertaking of a statutory duty to bargain with the [one union] constituted an attempt to 'interfere with, influence, or coerce' [members of a different union], a violation of the Railway Labor Act, Section 2, Third . . . . To say that the performance of this legal obligation was illegal is a non-sequitur to which we cannot subscribe."

Moreover, as the Eleventh Circuit was careful to note, there is no allegation

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[7](...continued)
context. See, e.g., Welch Scientific Co. v. NLRB, 340 F.2d 199 (2d Cir. 1965); Black Grievance Committee v. NLRB, 749 F.2d 1072 (3d Cir. 1984), cert. denied, 472 U.S. 1008 (1985).

that United recognized or treated any union as the representative of the CSRs. There is, therefore, no substance to petitioners' claim that the Eleventh Circuit's decision sets a "dangerous precedent" that would allow employers to "recognize" minority unions.

Finally, it was not United's negotiation with the IAM and ALPA that allegedly harmed petitioners, but implementation by United of the wage and benefit reductions set forth in the ESOP agreement. United could have implemented the same reductions, or more onerous ones, without ever talking to the IAM or ALPA, and even if a federal court were to order rescission of those wage reductions, United could "unilaterally" implement the very same reductions the next day. There is simply no meaningful distinction between voluntarily implementing wage and benefit reductions and voluntarily entering into an agreement with a third party to do so. Thus, while petitioners complain about the coercive effect of United's discussion with the unions regarding their participation in the ESOP, their complaint is actually directed at the changes in the terms and conditions of their employment, not the manner in which those changes were decided. The Eleventh Circuit correctly held that the RLA does not provide the means for petitioners to redress their dissatisfaction.

IV. THE PETITION SHOULD BE DENIED FOR OTHER REASONS

In addition to the above reasons, this is an inappropriate case for the Court's review because the opinion of the Eleventh Circuit was not selected for official publication and therefore cannot serve as precedential authority. Thus, even if the Eleventh Circuit's opinion was incorrect -- which it is not -- the opinion still would not create any confusion among the lower courts as to the proper application of this Court's precedents and interpretation of the RLA.[8]

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[8] Petitioners append several news articles, not part of the record below, in an attempt to convince this Court that other carriers may engage in similar ESOP negotiations. (Petition at 12; A 41-53.) There is no authority for including such extraneous material in the appendix. (See Supreme Court Rule 14.) At any rate none of the articles mentions the opinion in this case nor suggests that the Eleventh Circuit's unpublished decision has had any influence on such ESOP negotiations. Thus, they are irrelevant to the Petition and should be stricken.

CONCLUSION

Petitioners have raised no conflict in their petition that requires resolution by this Court nor any other "compelling" reason to justify granting review of the Eleventh Circuit's decision in this case. Accordingly, the petition should be denied.

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